(23,257 and 23,258)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 682.

EDMUND BURKE

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY AND THE KERN TRADING & OIL COMPANY.

No. 683.

J. I. LAMPRECHT AND F. M. AIKEN, TRUSTEES,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY, THE KERN TRADING & OIL COMPANY, AND T. S. MINOT.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 22, 1912.

1 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1981.

EDMUND BURKE, Appellant,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY (a Corporation) and The Kern Trading and Oil Company (a Corporation), Appellees.

No. 2028.

J. I. LAMPRECHT and F. M. AIKEN, Trustees, Appellants,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY (a Corporation), The Kern Trading & Oil Company (a Corporation), and T. S. Minot, Appellees.

Whereas the appellant in the above entitled cause was the complainant in the court below in a suit in equity brought against the appellees as defendants, in which he alleged, in substance, that The Kern Trading and Oil Company, a corporation of the State of California, wholly owned, dominated, controlled and operated by the Southern Pacific Railroad Company, is the lessee of certain lands included in the land grant to the Southern Pacific Railroad Company made by Congress on July 27, 1866, (14 Stats. 292,) and the Joint Resolution of Congress of date June 28, 1870 (16 Stats. 382); that the complainant, subject only to the paramount title of the United States, is the owner and entitled to the possession of an undivided one-tenth interest in certain described sections of the land so listed as placer mining claims under the mining laws of the United States; that prior to July 9, 1892, all the lands described in the bill were covered by valid subsisting mining locations made theretofore by divers citizens of the United States pursuant to the mining
2 laws, and made after discovery of mineral on the said respective claims, that on July 10, 1894, a patent purporting to convey 3200 acres of the lands so granted by Congress to the Southern Pacific Railroad Company, including the lands in controversy herein, issued from the United States to that company and was accepted by it and recorded; that at the time of the issuance of said patent the lands embraced in the said mining claims were not public lands subject to sale and disposition but were segregated from the public domain, the beneficial title thereto being held by the mining locators of which the said railroad company had due notice, and that having such knowledge the said railroad company did falsely and corruptly cause one Madden, its land agent, to make and he did make on May 9, 1892, a false and fraudulent affidavit and application in which he deposed that the lists of lands presented for patent are a correct list of lands inuring to the railroad company to aid in the construction of its road, and that the lands were vacant,

the railroad company prevent him from attacking the patent on the ground of fraud, error or irregularity in the issuance thereof as so alleged in the bill.

Seventh. If the mineral exception clause was inserted in
6 the patent with the consent of the Defendant, Southern Pacific Railroad Company, and under an understanding and agreement between it and the officers of the Interior Department, that said clause should be effective to keep in the United States title to such of the lands described in the patent as were, in fact, mineral, are the Defendants, Southern Pacific Railroad Company and the Kern Trading and Oil Company, estopped to deny the validity of said clause?

Dated, March 18th, 1912.

(Signed) WILLIAM B. GILBERT,
Circuit Judge.
WM. W. MORROW,
Circuit Judge.
CHAS. E. WOLVERTON,
District Judge.

(Endorsed:) Certificate of United States Circuit Court of Appeals for the Ninth Circuit, Under Section 134 of the Act of Congress of March 3, 1911, Certifying Certain Questions to the Supreme Court of the United States Filed April 1, 1912. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

7 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1981.

EDMUND BURKE, Appellant,
vs.
THE SOUTHERN PACIFIC RAILROAD COMPANY (a Corporation) and The Kern Trading and Oil Company (a Corporation), Appellees.

No. 2028.

J. I. LAMPRECHT and F. M. AIKEN, Trustees, Appellants,
vs.
THE SOUTHERN PACIFIC RAILROAD COMPANY (a Corporation), The Kern Trading & Oil Company (a Corporation), and T. S. Minot, Appellees.

Certificate of Clerk U. S. Circuit Court of Appeals to Certificate of said Court Certifying Certain Questions to the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing six (6) pages, numbered from and including one (1) to and including six (6), to be a full, true, and correct copy of a Certificate

of said Circuit Court of Appeals under the provisions of Section 134 of the Judicial Code, approved March 3, 1911, certifying certain questions to the Supreme Court of the United States in the above-entitled causes, as the original of said Certificate remains on file and appears of record in my office.

8 Pursuant to the orders of the said Circuit Court of Appeals entered in the above-entitled causes on, respectively, the 22nd day of March, A. D. 1912, and the 1st day of April, A. D. 1912, I do hereby further certify that a certified copy of the printed Transcript of the Record in the said Circuit Court of Appeals in each of the above-entitled causes accompanies the foregoing certified copy of said Certificate and is transmitted therewith to the said Supreme Court.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 17th day of April, A. D. 1912.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

9 [Endorsed:] No. 1981. United States Circuit Court of Appeals for the Ninth Circuit. Edmund Burke vs. The Southern Pacific Railroad Company et al. Certified Copy of Certificate of United States Circuit Court of Appeals for the Ninth Circuit, Under Section 134 of the Act of Congress of March 3, 1911, Certifying certain Question- to the Supreme Court of the United States.

Endorsed on cover: File No. 23,257. U. S. Circuit Court Appeals, 9th Circuit. Term No. 682. Edmund Burke vs. The Southern Pacific Railroad Company and The Kern Trading & Oil Company. File No. 23,258. Term No. 683. J. I. Lamprecht and F. M. Aiken, trustees, vs. The Southern Pacific Railroad Company, The Kern Trading & Oil Company, and T. S. Minot. Filed June 17, 1912. File No-. 23,257 & 23,258.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1912.

Edmund Burke,
Appellant.

vs.

Southern Pacific Railroad Company and Kern Trading and Oil Company,
Appellees.

Petition to Advance Hearing of Questions Certified to this Court by the Circuit Court of Appeals, Ninth Circuit.

The petition of Edmund Burke, appellant, respectfully shows to this honorable court as follows:

1. Appellant, Edmund Burke, in the above entitled cause was the appellant in the court below in a suit in equity brought against the appellees as defendant in the United States Circuit Court in which he alleged in substance, that the Kern

Trading and Oil Company, a corporation wholly owned, dominated, controlled and operated by the Southern Pacific Railroad Company, is the lessee of certain lands included in the land grant to the Southern Pacific Railroad Company made by congress on July 27, 1866 (14 Stat. 292), and the joint resolution of congress of July 27, 1870 (16 Stat. 382); that the appellant, subject only to the paramount title of the United States, is the owner and entitled to the possession of an undivided one-tenth interest in certain described sections of land so tested as placer mining claims under the mining laws of the United States; that prior to July 9, 1892, all the lands described in the bill were covered by valid, subsisting mining locations made theretofore by divers citizens of the United States, pursuant to the mining laws and made after discovery of mineral on said respective claims; that on July 10, 1894, a patent purporting to convey 440,000 acres of the lands so granted by congress to the Southern Pacific Railroad Company, including the lands in controversy herein, issued from the United States to that company and was accepted by it and recorded in the office of the recorder of Fresno county, California, in which county said lands are situate; that at the time of the issuance of said patent the lands embraced in the said mining claims were not public lands subject to sale and disposition but were segregated from the public domain, the beneficial title

thereto being held by the mining locators of which the railroad company had due notice, and having such knowledge the said railroad company did falsely and corruptly cause one Madden, its land agent, to make and he did make a false and fraudulent affidavit and application in which he deposed that the lists of lands presented for patent were a correct list of lands inuring to the railroad company to aid in the construction of its road, and that the lands were vacant, unappropriated and not interdicted mineral or reserved lands; that no notice of said application for patent was given to any of the owners of the mining locations then existing upon said lands and no hearing was had in the land office or in the department of the Interior concerning the character of the land or for the purpose of determining the same, and that the patent so issued to the railroad company was issued without any such investigation or determination; that the patent contained an exception and reservation reading as follows:

"Yet excluding and excepting all mineral lands should any such be found in the tracts aforesaid, but this exclusion and exception, according to the terms of the statute, shall not be construed to include iron and coal lands;" that under said patent the railroad company now claims to own each and every legal subdivision of the land described therein but it has never been at any time in the actual, open, peaceful, notorious public or physi-

cal possession of any part of the same nor was it in such possession at the time of the commencement of this suit, but that the said lands have been wild, open, unoccupied, unappropriated lands free from any sign or any claim of domination or ownership by any of the defendants; that the said prior locators on said mining claims having failed to perform their annual labor for the year 1908, the complainant and his associates entered on said lands in March, 1909, and exercising forfeiture by reason of such failure to do such annual labor they relocated the same in accordance with the mining laws of the United States, after making a due discovery of mineral upon the land covered by each location and that prior thereto said land had been properly and legally designated by the department of the interior as lands bearing mineral, to-wit, petroleum in commercial quantities, and more valuable for mining than for agricultural purposes.

The prayer of the bill was that the defendants and each of them be estopped from claiming any right, title or interest in or to the lands involved in the suit, that the title of complainant be quieted and that defendants be enjoined from interfering with the property claimed by the complainant and for such other and further relief as might be equitable.

Heretofore a general demurrer for want of equity at circuit was sustained, said court hold-

ing that the patent was itself conclusive of the agricultural quality of the lands described in the patent and bill and that the mineral exception therein being a limitation of the land grant was nugatory and void, whereupon a decree was entered dismissing said bill and thereupon appellant duly appealed to the Circuit Court of Appeals for the Ninth Circuit and said appeal was argued and submitted to said court, and subsequently, the court being divided in opinion certified seven questions of law to this court for the stated reason that the questions so involved are of public importance and affect the rights of locators of numerous mining claims and that several similar cases were pending in said court and that other cases would also be appealed to said court and said court being in doubt and divided in opinion made the certain certificate, a copy of which is annexed to this petition and is hereby referred to and made a part hereof.

Your petitioner further says that the title to mineral lands of the reasonable value of seven hundred and fifty millions of dollars is dependent on the decision that may be made herein by this honorable court and that the value of the lands involved in this present controversy exceed twenty-five million dollars in amount and that the suit is one of great public interest in California and great unrest and uncertainty exists concerning the title to thousands of acres of land claimed

by the defendant railroad company under its patents containing the exception of mineral lands and that an early decision will be of great value to all engaged in the production of petroleum.

Your petitioner further says that such uncertainty has been augmented since the decision of Judge Ross sustaining the demurrer and holding the patent conclusive and the mineral exception nugatory by reason of decisions to the contrary by Judge Bean in the United States Circuit Court in the Oregon District and by the Supreme Court of the state of California, while at about the same time the Supreme Court of Oregon held that a patent for known mineral lands was void and by reason of the fact that the United States is contending for the propositions advanced by your petitioner in suits about to be filed urging that the mineral exception is valid and that the effect thereof is to retain to the United States the legal title of the lands in controversy.

Wherefore, your petitioner prays that the hearing on the questions so certified by the Circuit Court of Appeals to this honorable court may be advanced to a date that this honorable court may under the circumstances deem proper.

And your petitioner will ever pray.

EDMUND BURKE,

Attorney in Pro. Per.

EXHIBIT A.

United States Circuit Court of Appeals for the Ninth Circuit.

Edmund Burke, appellant, vs. The Southern Pacific Railroad Company (a corporation) and The Kern Trading and Oil Company (a corporation), appellees.

No. 1981.

Whereas, the appellant in the above entitled cause was the complainant in the court below in a suit in equity brought against the appellees as defendants, in which he alleged, in substance, that the Kern Trading and Oil Company, a corporation, of the state of California, wholly owned, dominated, controlled and operated by the Southern Pacific Railroad Company, is the lessee of certain lands included in the land grant to the Southern Pacific Railroad Company made by congress on July 27, 1866 (14 Stats. 292), and the joint resolution of congress of date June 28, 1870 (16 Stats. 382); that the complainant, subject only to the paramount title of the United States, is the owner and entitled to the possession of an undivided one-tenth interest in certain described sections of the land so listed as placer mining claims under the mining laws of the United States; that prior to July 9, 1892, all the lands described in the bill were covered by valid subsisting mining locations made theretofore by divers

citizens of the United States, pursuant to the mining laws, and made after discovery of mineral on the said respective claims, that on July 10, 1894, a patent purporting to convey 3200 acres of the lands so granted by congress to the Southern Pacific Railroad Company, including the lands in controversy herein, issued from the United States to that company and was accepted by it and recorded; that at the time of the issuance of said patent the lands embraced in the said mining claims were not public lands subject to sale and disposition but were segregated from the public domain, the beneficial title thereto being held by the mining locators of which the said railroad company had due notice, and that having such knowledge the said railroad company did falsely and corruptly cause one Madden, its land agent, to make and he did make on May 9, 1892, a false and fraudulent affidavit and application in which he deposed that the lists of lands presented for patent are a correct list of lands inuring to the railroad company to aid in the construction of its road, and that the lands were vacant, unappropriated and not interdicted mineral or reserved lands; that no notice of said application for patent was given to any of the owners of the mining locations then existing upon said land, and no hearing was had in the land office or in the department of the interior concerning the character of the land or for the purpose of determining the same,

and that the patent so issued to the railroad company was issued without any such investigation or determination; that the patent contained an exception and reservation which reads as follows:

"Excluding and excepting all mineral lands should any such be found in the tracts aforesaid, but this exclusion and exception, according to the terms of the statute, shall not be construed to include coal and iron lands;" that under said patent the railroad company now claims to own each and every legal subdivision of the land described therein but that it has never been at any time in the actual, open, peaceful, notorious, public or physical possession of any part of the same nor was it in such possession at the time of the commencement of this suit, but that the said lands have been wild, open, unoccupied, unappropriated lands free from any physical sign of any claim of domination or ownership by any of the defendants to the bill; that the said prior locators of said mining claims having failed to perform their annual labor for the year 1908, the complainant and his associates entered on said lands in March, 1909, and exercising forfeiture by reason of such failure to do such annual labor they relocated the same in accordance with the mining laws of the United States, after making due discovery of mineral upon the land covered by each location, and that prior thereto said land had been properly and legally designated by the department of the interior as lands bearing mineral, to-wit, petroleum, in commercial quantities, and more valuable for mining than for agricultural purposes. The prayer of the bill was that the defendants and each of them be estopped from claiming any right, title or interest in or to any of the lands involved in the suit, that they be enjoined from interfering with the property claimed by the com-

plainant or the minerals therein, and for such other and further relief as might be equitable.

And whereas, J. I. Lamprecht *et al.*, who were defendants to said bill, filed a cross-bill in said cause alleging the same facts as did the complaint therein, and seeking the same relief as was prayed for in the bill and in said cross-bill did also allege as follows:

"These cross-complainants further say and show unto the court, that the said Southern Pacific Railroad Company, with full knowledge of all the facts and circumstances herein stated and alleged, did, for itself, its successors and assigns forever, accept and assent to, and submit to, and agree to be bound by each and all of the provisions, stipulations, terms, conditions, restrictions, limitations, exclusions and reservations in said act and joint resolution, and in said patent or either or any of them contained, and so accepting the same and assenting and submitting thereto, and agreeing to be bound thereby, did receive and accept said alleged patent and cause the same to be recorded in the office of the recorder of the county of Fresno, and state of California, and that said defendant, Southern Pacific Railroad Company, and all persons claiming any interest in said lands or any part thereof, under or through it by virtue of said act of congress and joint resolution, and said patent or any or either of them, are bound by all of said provisions, stipulations, terms, conditions, restrictions, limitations, exclusions, exceptions, and reservations, and are in equity and conscience estopped to resist or deny the binding force and effect of same or any part thereof."

And whereas, the court below sustained the joint demurrers of the defendants to said bill and to said cross-bill for want of equity, said court

holding that the patent was itself conclusive of the agricultural quality of the lands described therein, and that the mineral exception therein expressed was nugatory; whereupon a decree was entered dismissing the bill and the cross-bill, from which decree appeals are taken to this court; and said cause on the appeals having been argued and submitted to this court, and whereas the decision of the case on the appeals depends wholly upon the proper construction of the said grant to the railroad company and the patent which issued thereupon, and the questions so involved are of public importance and effect the rights of locators of numerous mining claims on the lands included in said patent, and there are now pending in this court, on appeal, three cases and other cases will be appealed to this court, the decision of which depend upon the proper answer to the questions herein certified, and this court is in doubt and is divided in opinion upon the proper answer to the said questions. The following questions are hereby certified to the Supreme Court of the United States for its decision:

First: Did the said grant to the Southern Pacific Railroad Company include mineral lands which were known to be such at or prior to the date of the patent of July 10, 1894?

Second: Does a patent to a railroad company under a grant which excludes mineral lands as in the present case, but which is issued without any

investigation upon the part of the officers of the land office or of the department of the interior as to the quality of the land, whether agricultural or mineral, and without hearing upon or determination of the quality of the lands, operate to convey lands which are thereafter ascertained to be mineral?

Third: Is the reservation and exception contained in the grant in the patent to the Southern Pacific Railroad Company void and of no effect?

Fourth: If the reservation of mineral lands as expressed in the patent is void, then is the patent upon a collateral attach a conclusive and official declaration that the land is agricultural and that all the requirements preliminary to the issuances of the patent have been complied with?

Fifth: Is petroleum or mineral oil within the meaning of the term mineral as it was used in said acts of congress reserving mineral land from the railroad land grants?

Sixth: Does the fact that the appellant was not in privity with the government in any respect at the time when the patent was issued to the railroad company prevent him from attaching the patent on the ground of fraud, error or irregularity in the issuance thereof as so alleged in the bill?

Seventh: If the mineral exception clause was inserted in the patent with the consent of the defendant, Southern Pacific Railroad Company, and

under an understanding and agreement between it and the officers of the interior department, that said clause should be effective to keep in the United States title to such of the lands described in the patent as were, in fact, mineral, are the defendants, Southern Pacific Railroad Company and the Kern Trading and Oil Company, estopped to deny the validity of said clause?

Dated March 18th, 1912.

(Signed) WILLIAM B. GILBERT,
Circuit Judge.
WM. W. MORROW,
Circuit Judge.
CHAS. E. WOLVERTON,
District Judge.

(Endorsed): Certificate of United States Circuit Court of Appeals for the Ninth Circuit, under section 134 of the Act of Congress of March 3, 1911, certifying certain questions to the Supreme Court of the United States. Filed April 1, 1912. F. D. Monckton, clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

Los Angeles, California,
August 26, 1912.

To Maxwell Evarts, Esq., #365 Broadway, New York City.

Dear Sir: You will please take notice that, upon the coming in of the Supreme Court of the United States, at the beginning of its October

term, 1912, on Monday, October 14, 1912, or as soon thereafter as counsel may be heard, petition for the advancement of the hearing on the questions of law certified by the United States Circuit Court of Appeals, to the Supreme Court of the United States, of which the foregoing is a true copy, will be presented to said Supreme Court for its consideration and action.

Respectfully,

EDMUND BURKE,

Attorney in Pro. Per.

Service of service admitted this ..... day of August, 1912.

.....

Attorney for Appellees.

3

FILED

NOV 14 1917

JAMES H. McKENNEY,
Clerk.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

Edmund Burke,
Appellant,
vs.
The Southern Pacific Railroad Company and Iron Trading and Oil Company,
Appellees.

279
No. 688.

APPELLANT'S BRIEF.

Emerson Burke,
Attorney in Pro. Per.

Parker & Stone Co., Law Printers, Los Angeles, Cal.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

Edmund Burke,
Appellant,

vs.

The Southern Pacific Railroad Company and Kern Trading and Oil Company,
Appellees.

APPELLANT'S BRIEF.

STATEMENT.

Heretofore a general demurrer interposed by the above named appellees to the bill of complaint of the appellant herein was sustained by Judge Ross sitting at Circuit in the Southern District of California.

The appellant thereupon took his appeal and after submission of the same in the Circuit Court of Appeals, for the 9th Circuit, the judges thereof, being unable to agree, made an order certifying seven questions of law to this court.

The certificate which contains all the facts, reads as follows:

In the United States Circuit Court of Appeals, for the Ninth Circuit.

Edmund Burke, appellant, vs. The Southern Pacific Railroad Company (a corporation) and The Kern Trading and Oil Company (a corporation), appellees. No. 1981.

Whereas the appellant in the above entitled cause was the complainant in the court below in a suit in equity brought against the appellees as defendants, in which he alleged, in substance, that The Kern Trading and Oil Company, a corporation of the state of California, wholly owned, dominated, controlled and operated by the Southern Pacific Railroad Company, is the lessee of certain lands included in the land grant to the Southern Pacific Railroad Company made by congress on July 27, 1866, (14 Stats. 292), and the joint resolution of congress of date June 28, 1870 (16 Stats. 382); that the complainant, subject only to the paramount title of the United States, is the owner and entitled to the possession of an undivided one-tenth interest in certain described sections of the land so listed as placer mining claims under the mining laws of the United States; that prior to July 9, 1892, all the lands described in the bill were covered by valid subsisting mining locations made theretofore by divers citizens of the United States pursuant to the mining laws, and made after discovery of mineral on the said respective claims, that on July 10, 1894, a patent purporting to convey 3200 acres of the lands so granted by congress to the Southern Pacific Railroad Company, including the lands in controversy herein, issued from the United States to that company and was accepted by it and recorded; that at the time of the issuance of said patent the lands embraced in

the said mining claims were not public lands subject to sale and disposition but were segregated from the public domain, the beneficial title thereto being held by the mining locators of which the said railroad company had due notice, and that having such knowledge the said railroad company did falsely and corruptly cause one Madden, its land agent, to make and he did make on May 9, 1892, a false and fraudulent affidavit and application in which he deposed that the lists of lands presented for patent are a correct list of lands inuring to the railroad company to aid in the construction of its road, and that the lands were vacant, unappropriated and not interdicted mineral or reserved lands; that no notice of said application for patent was given to any of the owners of the mining locations then existing upon said land, and no hearing was had in the land office or in the Department of the Interior concerning the character of the land or for the purpose of determining the same, and that the patent so issued to the railroad company was issued without any such investigation or determination; that the patent contained an exception and reservation which reads as follows:

"Excluding and excepting all mineral lands should any such be found in the tracts aforesaid, but this exclusion and exception, according to the terms of the statute, shall not be construed to include coal and iron lands";

that under said patent the railroad company now claims to own each and every legal subdivision of the land described therein but that it has never been at any time in the actual, open, peaceful, notorious, public or physical possession of any part of the same nor was it in such possession at the time of the commencement of this suit, but that the said lands have been wild, open, unoccupied, unappropriated lands free from any physical sign

of any claim of domination or ownership by any of the defendants to the bill; that the said prior locators of said mining claims having failed to perform their annual labor for the year 1908, the complainant and his associates entered on said lands in March, 1909, and exercising forfeiture by reason of such failure to do such annual labor they relocated the same in accordance with the mining laws of the United States, after making due discovery of mineral upon the land covered by each location, and that prior thereto said land had been properly and legally designated by the Department of the Interior, as lands bearing mineral, to-wit, petroleum, in commercial quantities, and more valuable for mining than for agricultural purposes. The prayer of the bill was that the defendants and each of them be estopped from claiming any right, title or interest in or to any of the lands involved in the suit, that they be enjoined from interfering with the property claimed by the complainant or the minerals therein, and for such other and further relief as might be equitable.

And whereas J. I. Lamprecht *et al.*, who were defendants to said bill, filed a cross-bill in said cause alleging the same facts as did the complaint therein, and seeking the same relief as was prayed for in the bill and in said cross-bill did also allege as follows:

"These cross-complainants further say and show unto the court, that the said Southern Pacific Railroad Company, with full knowledge of all the facts and circumstances herein stated and alleged, did, for itself, its successors and assigns forever, accept and assent to, and submit to, and agree to be bound by each and all of the provisions, stipulations, terms, conditions, restrictions, limitations, exclusions and reservations in said act and joint resolution, and in said patent or either or any of them contained,

and so accepting the same and assenting and submitting thereto, and agreeing to be bound thereby, did receive and accept said alleged patent and cause the same to be recorded in the office of the recorder of the county of Fresno, and state of California, and that said defendant, Southern Pacific Railroad Company, and all persons claiming any interest in said lands or any part thereof, under or through it by virtue of said act of congress and joint resolution, and said patent or any or either of them, are bound by all of said provisions, stipulations, terms, conditions, restrictions, limitations, exclusions, exceptions and reservations, and are in equity and in conscience estopped to resist or deny the binding force and effect of same or any part of any thereof."

And whereas the court below sustained the joint demurrers of the defendants to said bill and to said cross-bill for want of equity, said court holding that the patent was itself conclusive of the agricultural quality of the lands described therein, and that the mineral exception therein expressed was nugatory; whereupon a decree was entered dismissing the bill and the cross-bill, from which decree appeals are taken to this court; and said cause on the appeals having been argued and submitted in this court, and whereas the decision of the case on the appeals depends wholly upon the proper construction of the said grant to the railroad company and the patent which issued thereupon, and the questions so involved are of public importance and affect the rights of locators of numerous mining claims on the lands included in said patent, and there are now pending in this court on appeal three cases and other cases will be appealed to this court, the decision of which depend upon the proper answer to the questions herein certified, and this court is in doubt and is divided in opinion upon the proper answer to the said questions,

the following questions are hereby certified to the Supreme Court of the United States for its decision:

FIRST: DID THE SAID GRANT TO THE SOUTHERN PACIFIC RAILROAD COMPANY INCLUDE MINERAL LANDS WHICH WERE KNOWN TO BE SUCH AT OR PRIOR TO THE DATE OF THE PATENT OF JULY 10, 1894;

SECOND: DOES A PATENT TO A RAILROAD COMPANY UNDER A GRANT WHICH EXCLUDES MINERAL LANDS AS IN THE PRESENT CASE, BUT WHICH IS ISSUED WITHOUT ANY INVESTIGATION UPON THE PART OF THE OFFICERS OF THE LAND OFFICE OR OF THE DEPARTMENT OF THE INTERIOR AS TO THE QUALITY OF THE LAND, WHETHER AGRICULTURAL OR MINERAL, AND WITHOUT HEARING UPON OR DETERMINATION OF THE QUALITY OF THE LANDS, OPERATE TO CONVEY LANDS WHICH ARE THEREAFTER ASCERTAINED TO BE MINERAL.

THIRD: IS THE RESERVATION AND EXCEPTION CONTAINED IN THE GRANT IN THE PATENT TO THE SOUTHERN PACIFIC RAILROAD COMPANY VOID AND OF NO EFFECT.

FOURTH: IF THE RESERVATION OF MINERAL LANDS AS EXPRESSED IN THE PATENT IS VOID, THEN IS THE PATENT UPON A COLLATERAL ATTACK A CONCLUSIVE AND OFFICIAL DECLARATION THAT THE LAND IS AGRICULTURAL AND THAT ALL THE REQUIREMENTS PRELIMINARY TO THE ISSUANCE OF THE PATENT HAVE BEEN COMPLIED WITH.

FIFTH: IS PETROLEUM OR MINERAL OIL WITHIN THE MEANING OF THE TERM MINERAL AS IT WAS USED IN SAID ACTS OF CONGRESS RESERVING MINERAL LAND FROM THE RAILROAD LAND GRANTS.

SIXTH: DOES THE FACT THAT THE APPELLANT WAS NOT IN PRIVITY WITH THE GOVERNMENT IN ANY RESPECT AT THE TIME WHEN THE PATENT WAS ISSUED TO THE RAILROAD COMPANY PREVENT HIM FROM ATTACKING THE PATENT ON THE GROUND OF FRAUD, ERROR OR IRREGULARITY IN THE ISSUANCE THEREOF AS SO ALLEGED IN THE BILL.

SEVENTH: IF THE MINERAL EXCEPTION CLAUSE WAS INSERTED IN THE PATENT WITH THE CONSENT OF THE DEFENDANT, SOUTHERN PACIFIC RAILROAD COMPANY, AND UNDER AN UNDERSTANDING AND AGREEMENT BETWEEN IT AND THE OFFICERS OF THE INTERIOR DEPARTMENT, THAT SAID CLAUSE SHOULD BE EFFECTIVE TO KEEP IN THE UNITED STATES TITLE TO SUCH OF THE LANDS DESCRIBED IN THE PATENT AS WERE, IN FACT, MINERAL, ARE THE DEFENDANTS, SOUTHERN PACIFIC RAILROAD COMPANY AND THE KERN TRADING AND OIL COMPANY, ESTOPPED TO DENY THE VALIDITY OF SAID CLAUSE?

The bill of complaint will be found in the appendix of this brief marked exhibit "A," at page 399

The demurrer will be found in the appendix marked exhibit "B," at page 419

The demurrer in the suit of *Roberts v. Southern Pacific Railroad Company* was heard by Judge Ross in conjunction with the demurrer in this suit and the opinion rendered by Judge Ross was in the Roberts suit and not in this suit and that opinion, together with the memorandum made by Judge Ross in

this suit, will be found in the appendix marked exhibit "C," at page 427

ARGUMENT.

A concise and accurate statement of the basis of the suit is set out in the certificate.

The certification to this court was proper for many reasons and especially for the reason the decision will affect property valued at upwards five hundred millions of dollars and that property, if the illegal claims of the Southern Pacific Railroad Company be defeated, will revert to the United States or will be open to the perfecting of mining locations under the mining laws, by citizens of the United States.

The first question, under the certifications, that is presented to this court is,

I.

"Did the said grant to the Southern Pacific Railroad Company include mineral lands which were known to be mineral at or prior to the date of the patent of July 10, 1894?"

This question was fully answered in the negative by this court in the case of *Barden v. Southern Pacific Railroad Co.*, 154 U. S. 254. This court held that both ***known*** and ***unknown*** mineral lands were precluded from the

operation of the grant and that lands ascertained to be mineral were subject to location up to the time of a patent made up in the form and in the manner provided for in that decision, and containing a statement of the quality of the land together with jurisdictional recitals.

All the cases on the subject, including *Sanders v. R. R. Co., Shaw v. Kellogg*, etc., hold that in every instance of a railroad land grant mining locations may be made on mineral land embraced in the primary limits of the grant; that such right of location is not affected by the filing of the map of definite location but continues, in any event, up to the time of patent and we assume the first question was certified to this court by reason of our contention that in all known mineral land was excluded from the grant, was reserved and was not subject to patent and that a patent for *known* mineral land was void, and not conveying the legal title the land would remain open to location under the mining laws.

The Statute of *July 27, 1866*, under which a grant of non-mineral lands was made to the Southern Pacific Railroad Company (14 U. S. Stat. 292) reads, there was granted to the railroad company every alternate section of public land;

> "*Not mineral,* designated by odd numbers to the amount of twenty alternate sections per mile, on each side of said railroad line * * * provided further, *that all mineral lands be and the same are hereby excluded from the operation of this act* * * * that the word 'mineral' when it occurs in this act shall not be held to include iron or coal."

Section 2346, Title 32, Chap. 6, Revised Statutes of the U. S. 1872 reads as follows:

> "*No act* passed at the first session of the 38th congress, granting lands to states or corporations to aid in the construction of roads or for other purposes, or to extend the time of grants made prior to the 30th day of January, 1865, shall be so construed as to embrace mineral lands, *which in all cases are reserved exclusively to the United States,* unless otherwise specially provided in the act or acts making the grants."

By section 18 *of the Act of July 27, 1866,* the Southern Pacific Railroad Company was authorized to connect with the Atlantic and Pacific Railroad Company at a designated point and it was further provided that the Southern Pacific Railroad Company "shall have similar grants of land, *subject to all the conditions and limitations herein provided.*"

By the joint resolution of June 28, 1870, all the conditions and restrictions embodied in *section 3 of the Act of July 27, 1866,* are made applicable to the grant to the Southern Pacific Railroad Company.

The joint resolution makes it the duty of the secretary of the interior, subject to the restrictions therein contained, to issue patents to the Southern Pacific Railroad Company "*expressly reserving* all the rights of actual settlers, together with the *other conditions and restrictions*, provided for in the third section of said act (July 27, 1866)."

It appears by the certificate, and in the record of this action, that the lands in controversy were *known mineral* lands *long prior* to the grant and subsequent patent to the defendant railroad company and that such lands were held under and covered by valid subsisting mining locations before and at the time of patent, which locations had been made by qualified citizens of the United States, under the mining laws of the United States, and which notices of location had been duly recorded in the duly organized Coalinga mining district within which district said lands were embraced and that wholly without notice and on the *ex parte* application of the Southern Pacific Railroad Company, and without any proof, hearing, contest and *wholly without* any evidence, testimony, decision or determina-

tion by the land department of the agricultural or mineral or other quality of the land a patent containing an exception of known and unknown mineral lands issued to the Southern Pacific Railroad Company on July 10, 1894; that said defendant corporation accepted and recorded said patent; that said mineral exception of mineral lands was inserted in the patent *pursuant to express agreement and assent of the patentee.*

It further appears by the record that at no time did the lands in controversy pass into the possession, domination or control of the patentee or its lessee; that the lands on the date of entry by this appellant (March 2, 1909) were wild, unoccupied mountain mineral lands wholly unfit for any agricultural purpose and that the prior locators having failed to perform their annual labor for the year 1908 this appellant and his associates went upon the land on the 2d day of March, 1909, and exercising a forfeiture arising by reason of the non-performance by the prior locators of the required annual labor on said land for the year 1908, *relocated said lands.*

In connection therewith and wholly apart from any other question in the suit and as a wholly independent legal proposition this appellant contended that said patent was wholly void as against said original locators and that an estate of freehold remained in them

down to the moment of forfeiture and relocation by this appellant and thereupon a possessory title and a new estate of freehold passed to this appellant sufficient to maintain his action to quiet his title as against the Southern Pacific Railroad Company which was asserting prejudicial claims to said lands under said patent.

Under section 738 of the California Code of Civil Procedure a person in or out of possession may maintain an action to determine claims concerning real property against a person in or out of possession and the California Supreme Court in Buchner v. Malloy, 155 Cal. 255, while holding the owner of an equitable title could not maintain an action to quiet title against the owner of the legal title, also held that the owner of a possessory title under the mining laws of the United States was regarded as the owner in fee and could maintain any form of action, and especially an action to quiet title against the owner of the legal title in an effort to protect his possession, and the same rule has been repeatedly announced by the California Supreme Court. (See Van Ness v. Rooney, 160 Cal. 130.)

The reply to this proposition was that the patent was absolutely conclusive and that the court would presume that there were no mining claims or mining locators existing and, further, that appellant could not

urge that the patent was void and his relocation was valid because there was no privity at the time of relocation or rather at the time the patent issued to the defendant railroad company between the United States and this appellant—Judge Ross did not, so far as his opinion in the Roberts case shows, pass on the subject and we assert.

THE PATENT WAS, IN ANY EVENT, ABSOLUTELY VOID BY REASON OF THE KNOWN MINERAL QUALITY OF THE LANDS AND THE LEGAL TITLE DID NOT PASS THEREUNDER TO THE SOUTHERN PACIFIC RAILROAD COMPANY BUT REMAINED IN THE UNITED STATES WHICH HELD THE SAME IN TRUST FOR THE PRIOR LOCATORS DOWN TO THE MOMENT OF FORFEITURE AND RELOCATION WHEN A NEW ESTATE OF FREEHOLD AROSE TO THE RELOCATORS!

We contend at this point that the patent being void by reason of the forestated facts, the controverted mineral lands were open to relocation, *independent of the mineral exception*, and the patent subject to attack by reason of the fact the land was known to be mineral in character and under mining location and wholly without any agricultural value and that the defendant railroad company patentee had notice of all of the same at the time it applied, *ex parte*, for patent.

1. *In U. S. v. C. P. R. Co. et al.*, 84 *F.* 219, the Federal Circuit Court, citing *Stoddard v. Chambers, 2 How (U. S.) 284*, said, it being established the land was chiefly valuable for mineral at the time of the issuance of the patent, *the title could not be held valid* because *acquired contrary* to law. The syllabus in the case, which we submit is an accurate digest of the whole, reads:

> "A patent granted, under the Act of *July 27, 1866, which excepted mineral land, is void* if at the time of the issuance of the patent the land was *known* to be chiefly *valuable for mineral.*"

2. *In Van Ness v. Rooney, 160 Cal. 130*, it was held by the California Supreme Court that a patent issued for land known to be mineral was void and subject to attack.

3. *In Kansas City Mining and Miling Co. v. Clay, 29 P. 9 (3 Ariz. 326)* the Supreme Court of the then territory held that though a patent issued by the United States on a pre-emption entry is conclusive of claimant's qualifications to obtain land and of his good faith in the location and improvement, *it may be impeached* by showing that at the date of final proof there was *known to exist* mineral deposits which forbade it passing to entry and the court tersely repudiated the contention then made

(as made herein by the railroad patentee) that the presumption flowing from the patent was that the land was not mineral and was not known to be mineral, and the case has been cited favorably by state and federal courts, and in *Old Dominion C. M. & S. Co. v. Haverly*, 90 P. 336 (Arizona) the same court said:

> "We cannot, therefore, assert that it is a fact to be shown at the time of application *that the land does not contain* known mineral lands and that the patent is conclusive in that point. We conclude, therefore, that the exception of 'known mines or salines' under the pre-emption law should be construed as preventing passing under the act, of any title to such mines as are known to exist at the date of the application for patent *and hence as constituting* one of the exceptions to the conclusiveness of a patent mentioned by the court in *Smelting Co. v. Kemp* for want of authority or power in the land department to pass by pre-emption patent the title of the government to such mines.
>
> *The title remaining in the United States,* it follows that, when such patent issued, it might be collaterally attacked in an action at law by proof that such mines were known to exist at the time of the issuance of the patent, and its character as a conveyance of such mines be defeated."

These two decisions were made independent of the fact that at the time of the issuance of the patent the land *was not held under mining location.*

The case was cited approvingly in *Garrard & Silver Peak M. Co.*, 82 *Fed. 578*, by Judge Hawley and by the Circuit Court of Appeals, 9th Circuit in *94 Fed. 989*, which affirmed the judgment rendered by Judge Hawley.

4. *In United States & Culver, 52 Fed 81*, Judge Parker construing section 2318 of the revised statutes *that in all cases* lands valuable for minerals shall be reserved from sale, said:

> "If these lands were valuable for mineral, the defendant *could have no title* against the plaintiff, as the lands purchased by defendant were not liable to purchase as agricultural land at the time of purchase. In such case the title to the lands in the defendant could not be held valid because acquired against the law. *(Stoddard v. Chambers, 2 How. 284).*"

The same rule is laid down in *United States v. Blackburn, 48 P. 904*, and *United States v. Reed, 28 Fed. 482*, and *N. P. Railroad Co. v. Barden, 46 Fed. 610.*

5. In *Deffeback v. Hawke, 115 U. S. 392*, it was held:

> "1. *No* title from the United States to land known at the time of sale to be valuable for its minerals, etc., can be obtained under the homestead or pre-emption laws or townsite laws *or in any other way* than as presented by the laws authorizing such sales."

It has been the continuing contention of the Southern Pacific Railroad Company in this litigation that the rule of law applying to homestead and pre-emption patents *applied* to the patent in controversy.

Davis v. Weibold, 139 U. S. 507, as explicitly *construed* in the Barden case *(154 U. S. 288)* as well as the foregoing case, *squarely* holds *that no title* to known mineral lands could be obtained by a townsite or agricultural patent—The case cites the California case of *Alford & Barnum,* 45 Cal. 482: and the Nevada case of *Merrill & Dixon, 15 Nev. 401,* both railroad land grant cases, and other cases, all of which hold that if the land was more valuable for mining than for agriculture, at the time of the application for the patent, or at the time of the issuance of the patent, *the patent is void.*

The same rule, along other lines, is succintly applied in *Colorado Coal & Iron Co. v. U. S.,* 123 U. S. 307-328, and *U. S. v. Iron Silver Mining Co.,* 128 *U. S.* 673, the first arising under the coal land act and the latter under the placer mining act.

In *Sullivan & Iron Silver Mining Co.,* 143 *U. S.* 431, Mr. Justice Brewer said as follows:

> "In this, the district judge trying the case simply followed the opinion theretofore expressed by the circuit

judge to the effect that prior location (mining) was necessary before a vein or lode could be adjudged a *known* vein or lode *within the exception in the patent* and provision of section 2333, R. 5.

In this ruling was error as has been repeatedly determined by this court *(Reynolds v. Iron Silver Mining Co.*, 116 *U. S.*, 687; *Noyes v. Mantle*, 127 *U. S.* 348, 354.")

Counsel for the Southern Pacific Railroad Company in the courts below contended that lode, placer, townsite and mining patents generally were governed apart from agricultural patents and that the patent to the Southern Pacific Railroad Company was to be construed under the law relating to agricultural patents but it must be remembered that the railroad land grant patents *do not* issue under any agricultural law like a homestead or desert entry patent: they are land grant patents under a specific grant that, like the townsite law and patents, *exclude* mineral land; and counsel contended that the foregoing citations were not applicable as their patent was agricultural and the *"known"* mineral prohibition did not extend to them and counsel cited below, as we assume they will here, in support of their contentions, the cases of *Doe v. Waterloo*, 54 *Fed.* 939; *Horsky v. Moran*, 21 *Mont.* 345; *Carter v. Thompson*, 65 *Fed.* 329, and *King v. McAndrews*, 111 *Fed.* 860, *which were all* instances of *voidable* patents, *is-*

sued within the jurisdiction of the land department and each holding that only an antecedent or prior title could collaterally attack a patent in cases of *fraud, imposition and mistake,* the patent in each instance having *duly* issued within the jurisdiction of the land department and after actual investigation, determination and decision and the clearly elementary distinction between those patents and the one at bar is that our patent issued for *known* mineral land and was *without* the jurisdiction of the land department.

Counsel have not cited and cannot cite a case holding a patent to be conclusive except in instances where there has been a hearing and actual determination, between the parties, before the patent issued or where there had been an actual *determination* of the quality of the land in instances where the application was *ex parte.*

The great distinction under this point is that the land in controversy was not only known by the defendants to be mineral at the time of the application for the patent but the defendants and all the world had *notice* of a mineral quality of the land and of the existence of the antecedent estates of freehold based on the recorded mining locations.

Discussing the question of notice in an analogous case, *U. S. v. C. P. R. Co. et al.,* 84 *Fed.* 221, Judge Morrow said:

"I am of opinion these defendants had notice, actual or constructive, of the character of the land which they had contracted to buy from the grantee (R. R. Co.) and its trustees * * * *Notices of location had been filed of record in the mining recorder's office* of the Forks of *the Butte Mining District* before the defendants (grantees of the R. R. Co.) entered into their contracts to buy the land, etc. * * * "

In our case the locations of the prior locators were recorded in November, 1891, in the office of the recorder of the Coalinga mining district and the application for patent was made by the Southern Pacific Railroad Company in *May,* 1892, and patent issued July 10, 1894.

Counsel sought in the courts below to establish the proposition that the patent was *voidable* and not void and that only an antecedent title could maintain the solitary action to impress a trust upon the patent—that such a suit could be maintained under proper circumstances is elementary but it is not here—only in instances of voidable patents *issued within the jurisdiction* of the land department may such a suit be maintained; it *cannot* be maintained in instances of *void patents.*

Gold Hill Mining Co. v. Ish, 5 *Org.* 104.

In that case a federal patent issued in the presence of a mining location and the Supreme Court of Oregon held the patent

to be absolutely void. If the patent is void it is an absolute nullity and spells—nothing—and it required no action on part of the United States to clear the record; if there had been an actual contest in the land office and an actual decision then the patent would have been voidable and an attack or an action to charge the patent with a trust could have been maintained by the prior locators if they had maintained their possession.

7. In *Van Ness v. Rooney,* 160 Cal. 131, and in which, after full argument an application for a rehearing was denied, the California Supreme Court held that while it was the general rule that the issuance of a patent is a conclusive determination that the land is of a character that it might be disposed of under a *general* law providing for the disposition of public land, *not mineral,* the effect of the issuance of a patent for land was agricultural is to transfer to the patentee all mineral lands or deposits *subsequently* discovered within its boundaries and which were *not known* to exist at the time the patent issued. *But* the rule is equally well established that mineral deposits *known* to exist at the time the patent issued do not pass under it and the court cited in support of such proposition the cases of *Reynolds v. Iron Silver Min. Co.,* 116 *U. S.* 687; *Davis v. Wiebbold,* 139 *U. S.* 507; *Kansas Min. & Mill Co. v.*

Clay, 3 *Ariz.* 326, and *Loney v. Scott*, (129) 112 *Pac.* 173.

Heretofore we have referred to all of such cases except *Loney v. Scott* (decided in 1911) and in that case the Oregon Supreme Court held as follows:

> "The rule is that a patent to government land transfers to the patentee all veins, lodes or mineral deposits within its boundaries unless such mineral deposits *were known* to exist at the time of the issuance of the patent in which latter case the *known* mineral deposits do not pass by the patent."

The case was that of a placer locator contesting with an agricultural patentee and the court held the patent was *void* and did not pass the legal title and various cases were cited by the court and amongst them the Arizona case of *Kansas City Mining and Milling Co. v. Clay, supra.*

The same proposition was maintained by this court in the well known case of *Morton v. Nebraska*, 88 *U. S.* 660, in an instance where a patent issued for known saline lands taken up under a military bounty warrant. This court said, page 674:

> "The pre-emption Act of September 4, 1841, (5 Stat. at large, 456) declares "no lands on which are situate known salines *or mines* shall be liable to entry * * * it does not strengthen the case of

> plaintiff that they obtained certificates of entry *and that patents issued* subsequently on these certificates. It has been repeatedly held by this court that patents for lands which have been previously granted, reserved from sale or appropriation *were void*. The executive officers had no authority to issue a patent for the lands in controversy because they were not subject to entry, having been previously reserved, and this want of power may be proved by a defendant in an action at law." (*Burfenning v. Chi., St. St. Paul, etc.*, 163 *U. S.* 321.)

The reservation of salines, etc., under the act mentioned was not any more specific or special than under the subsequent and existing act which *reserved* all mineral lands and precluded them from all forms of entry except under the mining laws. This court held in the Morton-Nebraska case that the general reservation of salines, etc., rendered a pre-emption patent for the same void. The opinion in that case shows the salines were *known* and for that reason the patent was held void; the record in this case shows the lands were not only *known* to be mineral but public notice of that fact was given by the recordation of the notices of location. The Morton-Green-Nebraska attack was collateral and the attack on the patent and certification was wholly based on the fact the lands were known to be saline lands and consequently the collateral attack was sustained by this court on the ground

that the certification and patent were void, being in violation of the general reservation of all "lands on which are situate *known* salines or mines."

We submit our proposition in such regard is identical and the former case is conclusion of this branch of our controversy.

9. In *Horsky v. Moran*, 178 *U. S.* 211-212, this court said:

> "On the face of the patent there is nothing *to suggest any exception*—while it might be conceded that in an action *at law* by a claimant under that patent the existence of the mining claim, at the time of its issue, might be shown and be a valid defense to a recovery of so much of the ground as was included within the mining claim, and in that event it may perhaps be not inaptly said *the patent to that extent was void.* (*U. S. v. Stone*, 2 *Wall* 525). In such cases courts of law will pronounce them *void.* The patent *is but evidence* of the grant and the officer who issues it acts *ministerially* and not judicially."

If our patent is void, then the legal title remained in the United States and the land was open to location under the mining laws of the United States at the date of our entry.

10. Judge Sawyer in *Amador v. South*, 36 *Fed.* 670, speaking of the effect of an agricultural entry, said:

> "By entry and payment by A, *there being no mines* on the land, the entire estate to the center of the earth vested in him."

11. The cases of *Hermocilla v. Hubbell*, 89 *Cal.* 5; *Garrard v. Silver Peaks Mining Co.*, 82 *F.* 578, *Aff.* 94 *Fed*, are based on the case of *Mining Co. v. Consolidated Mining Co.*, 102 *U. S.* 168, in which it was held the question was:

"Were the disputed premises at the time of the grant *known* to be mineral; that is known to be valuable for minerals," and this court pointed out the analogy between the (school grant) act and railroad land grants, at *pages* 174-5, by saying:

> "It is a strong corroboration of this view that congress in section 12 of this same statute giving 72 sections for a seminary of learning, *declares no mineral lands* shall be taken under the act. * * * We find a similar provision in the grant to the Pacific Railroad Companies. Taking into consideration what is well known to have been the hesitancy and difficulty in the minds of the congressmen in dealing with mineral lands * * * it follows the land in controversy being mineral land * * * did *not pass* to the state under the school section grant."

Here again this court passed squarely on the question of a general reservation of mineral lands and pointed out that the reservation of such lands in the school land grants and said, "We find a similar provision in the grant to Pacific Railroad Companies." Of course there was no patent under consideration in the citation but the court was passing on a general reservation of mineral lands. If a grant of known mineral lands was void a patent of such mineral lands would not be in any better position under the ruling of this court in the Morton-Green-Nebraska case. If, after a grant of lands supposedly mineral, a patent issued after examination and an actual decision of the land department that the lands *were not* mineral, a totally different question would arise, but that question is not in this case. The bill of complaint herein alleges the land was known to be mineral, not only at the time of patent, but at the time of the grant and, admittedly, there was no subsequent examination of the lands except wherein and through its geological department the land office declared the lands in controversy to be mineral lands bearing petroleum in commercial quantities.

Counsel met our citations by reiterated reference to the cases of *Carter v. Thompson*, 65 *Fed.* 329; *King v. McAndrews*, 111 *Fed.* 861, and *Scott v. Lockey In-*

vestment Co., 60 *Fed.* 36, none of which are in point.

The syllabus in *Carter v. Thompson* so often cited by counsel is misleading and is at variance with the text of the decision—the case did not turn on the question of the *known* mineral character of the land—the court said:

> "The location of the claim under which complainant asserts title was made September 7, 1893. The townsite patent was issued June 15, 1872.
>
> The claim (contention) seems to be made that this patent was issued before the land *was* offered for sale at public auction and the question having been *passed* on and *decided* previously, it follows, as of course, that a subsequent mining claimant could not attack, *as the patent was only voidable and not void.*"

All of which is true and is not contested by us and it is the only point in the *Carter-Thompson* case.

So it is with their repeated citation of *King v. McAndrews, supra,* where it was rightfully held that the land department had jurisdiction to hear and determine, *as it did,* the claims of homesteaders and townsite claimants and issued patents therefor in accordance with *such decisions* and that such patents evidenced the legal title to the lands and were impervious to attack. We never contended otherwise.

It was an action of *ejectment* and the defendant in that action *sought to review* the action of the land department acting within its jurisdiction and there was no question arising in that case of the segregation of the land from the public domain, at the time of application for patent, by reason of prior valid, subsisting and duly recorded mining locations. The whole gist of the case was that a collateral attack could not be maintained in an action of ejectment, that in such an action the legal title running the patent controlled, as it was a case of a *voidable* patentee. The rule in actions of ejectment has no application here.

Counsel in the courts below made copious reference to *Scott v. Lockey Investment Co.*, 60 *Fed.* 36, a case that stands alone in principle and which has never been cited or referred to by any other court so far as we have, after diligent search, been able to find.

It holds that where an estate *of freehold has been created under the mining laws of the United States* under a mining location properly and legally made, that the estate of freehold so created and maintained *might* be *abolished* by a subsequent grant of the same land *made* to another person by the United States under another law for another purpose. And the court so decided on the authority of a previous decision made by himself. Commenting on such extraordinary proposition we content ourselves

by saying that such is not the law, never was the law and never will be the law, in the instance of a valid, perfected, subsisting location of mineral lands made under the mining laws of the United States. In that case the judge said (and on his saying the Southern Pacific Railroad Company rests its case):

> "Could the plaintiff with this possessory mining right, maintain an action against the United States to quiet its title to this possessory right even if it could sue the United States in such an action? The answer must be, he could not. How, then, can such an action be maintained against its grantor which has the title the United States possessed in the land, that is the paramount title in fee?"

Our answer is that in the presence of a perfected, valid, subsisting mining location, an equitable title, the United States held, until patent or legal cancellation of the location, the paramount title in trust for the mining locators and its attempted subsequent grant or alienation to another person under any law *would be void* and the patent would carry no title. *Our further answer is that all suits relating to the possessory title, by legislative authority, may be litigated in the courts of the United States independent of and without regard to the paramount title, which was not the case at the time of the rendering of the decision.*

In order to clinch this proposition and to show the utter futility of the contention of counsel we cite:

A—In *Noyes v. Mantle* 127 *U. S.* 349-351, this court, speaking of the right of a miner after location of his claim, said:

> "The claim was thenceforth their property. They needed only a patent of the United States to render their title perfect, and that they could obtain at any time upon proof what they had done in locating the claim and of subsequent expenditures to a specified amount in developing. *Until the patent issued, the government held the title in trust* for the locators or their *vendees.*"

B—In *Haws v. Victoria C. M. Co.*, 160 *U. S.* 303, this court said:

> "The possession under a claim established according to law, is fully recognized by the acts of congress, *and patent adds little* to the security of the party in continuous possession of the mines he has discovered or bought."

C—This court in *St. Louis Mining Co. v. Montana Min. Co.*, 171 *U. S.* 650-655, held that where there is a valid location of a mining claim, the *area becomes segregated from the public domain and is the property of the locator.* Can it be successfully contended here that such a *segregation* of the lands in controversy was not in force at the time the patent

issued? And if that segregation was in force, as the record shows it was, will it be successfully contended that it was within the jurisdiction of the land department, on an *ex parte* application, and without cancellation of the outstanding title to patent the land to another? The suggestion is, in our opinion, absurd, but it is the position of the Southern Pacific railroad that this court must, in order to uphold the patent, assume that there was no segregation.

Analagous rulings in 26 *Am. & Eng. Emc'y*, 381; *Michigan Land and Lumber Co. v. Rust*, 168 *U. S.* 589-593; *Hawley v. Diller*, 178 *U. S.* 476-489; *Clark v. Herington*, 186 *U. S.* 206, and in the courts below we cited upwards of one hundred cases on the subject but will not weary this court by piling up authority on an elementary proposition.

The second question certified to this court is intertwined with the first question and we shall necessarily cite many authorities, not heretofore cited, which have a direct bearing on both questions, severally and in their blended character.

The second question reads:

DOES A PATENT TO A RAILROAD COMPANY, UNDER A GRANT WHICH EXCLUDES MINERAL LANDS, AS IN THE PRESENT CASE, BUT WHICH IS ISSUED WITHOUT ANY INVESTIGATION UPON PART OF THE OFFICERS OF THE LAND OFFICE OR OF THE DEPARTMENT OF THE INTERIOR AS TO THE QUALITY OF THE LAND, WHETHER AGRICULTURAL OR MINERAL, AND WITHOUT HEARING UPON OR DETERMINATION OF THE QUALITY OF THE LANDS, OPERATE TO CONVEY LANDS WHICH ARE THEREAFTER ASCERTAINED TO BE MINERAL?

It will be noticed that the question is limited to lands *"thereafter ascertained to be mineral.* That is *not* the question in controversy, as we alleged that the lands were *known* to be mineral lands, not only at the time of the patent, but at the time of the grant. The question argued in the court below was "Was the patent conclusive of the agricultural quality of lands *known to be mineral prior to the issuance of the patent,"* and no contention was advanced by us on the proposition that the lands were *subsequently* ascertained to be mineral. The entire records conclusively supports us. We alleged that the lands were known to the defendant railroad prior to and at the time of the issuance of the patent to be mineral; that prior to and at the

time of the issuance of the patent the lands were held under divers valid, subsisting, recorded mining locations, of which the defendant railroad had notice.

We alleged a prior discovery of mineral and a subsequent forfeiture and a subsequent relocation which, *ipso facto,* was based on the prior discovery. No issue was raised by either side in the courts below concerning any discovery of mineral subsequent to the issue of the patent, but as it arises under the exception in the patent of known and unknown mineral lands, we will discuss it in *extenso,* observing, however, that the issue in this suit in such connection relates more particularly to the validity of the exception in its effect of cutting out *known mineral lands from the grant and patent* as pointed out in *Van Ness v. Rooney* and other cases cited under the first question certified to this court, although we contend that a patent issued in the manner pointed out in the second question is not conclusive of anything not actually determined or decided.

This question is to be determined independent of any reference to a patent containing a mineral exception and we shall discuss it on the basis that the patent does not contain an exception or reservation of mineral lands.

The record discloses that in May, 1891, the Southern Pacific Railroad Company made an application, *ex parte*, for patent on approximately 440,000 acres of land and on July 10, 1894, received a patent for the same. The patent will be found in the appendix, marked Exhibit "D," and the entire land office record on which the patent is based will be found in the appendix, marked Exhibit "E."

The record also discloses that the lands in controversy are included in the patent; that such lands were known to be mineral lands and more valuable for mining than for agricultural purposes long prior to the application for the patent and that the Southern Pacific Railroad Company had notice of such fact for many years prior to its application for patent.

The record also discloses that prior to and at the time of such application the lands in controversy were covered by valid, subsisting recorded mining locations, duly made by qualified citizens of the United States, all of which the Southern Pacific Railroad Company had notice and knowledge, but notwithstanding the same, the defendant railroad company knowingly and fraudulently caused a false and fraudulent application to be made for a patent of said lands, falsely and knowingly alleging that the lands sought were not interdicted mineral lands and that thereupon and thereafter and

wholly without notice to the said locators and wholly without any investigation of or determination of the quality of the lands and wholly without the jurisdiction of the land department, the patent issued and was delivered to and accepted by the defendant railroad company under such conditions.

The Southern Pacific Railroad Company contends that the *issuance* of such a patent is absolutely conclusive of the agricultural quality of the richest mineral lands in the world. We contend that under the circumstances the patent is not conclusive and is only conclusive of the facts actually passed on and determined by the land department.

Strictly speaking, the Southern Pacific Railroad Company does not contend that the patent is conclusive of the agricultural quality of the land *but that the issuance of the patent* is the decision and determination of such agricultural quality of the land and that we may not inspect the antecedent, record or the patent to ascertain what was decided or determined.

In other words, the defendant railroad company, while unpliedly admitting that the patent as written is worthless to it as a measure of defense, contends that the *mere issuance* of the patent is a conclusive determination of all its claimed rights to the lands in controversy.

The defendant railroad company is forced to such a contention by reason of the fact that the patent shows upon its face that there was no determination of the quality of the land and, consequently, and independent of the patent, and in face of the admitted fact that the land was and is of great value, a legal myth or presumption to the contrary is created *by the mere physical issuance of the patent.*

A. Turning to the patent we find, (1) that it *erroneously* recites that by the act of July 27, 1866, and the joint resolution of June 28, 1870, there was made a grant to the Southern Pacific Railroad Company of "Every alternate section of public land, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad, on the line thereof, *and within the limits of twenty miles on each side of said road.*"

The court will note that the statutory words *"not mineral"* are not contained in the recital and nowhere appear in the patent. The effect of such omission indicates either (a) that the land department arbitrarily disregarded the mandatory provisions of the law in deciding what character of land the defendant railroad company was entitled to under the granting acts and thus fell into a grave mistake of law, or (b) decided that the defendant railroad com-

pany was entitled to receive twenty sections per mile within the limits of twenty miles even if all the land was wholly mineral in character.

The defendant railroad company therefore is forced to contend that the patent is of no consequence and *thus impeaching* its own patent and collaterally attacking the same, is forced to assert that the *issuance*, the making up and signing the patent, independent of its contents and recitals, and of its antecedent record, is the *conclusive* base of its title.

We, on the contrary, do not assail the patent except under the first question, but *uphold it as it is written.* It is worth just what it shows to be worth and no more.

B. The patent recites there was a grant of lands to the amount of twenty alternate sections per mile *within the limits of twenty miles of the road.*

Such recital cannot be conclusive for two reasons: (1) the granting statutes provided for a grant of non-mineral land to the amount (within states) of *ten* alternate sections per mile and the recital in the patent to the contrary is untrue and if the land department so decided its finding is in violation of law and therefore void, and, (2) it is a physical and mathematical impossibility to *include twenty alternate sections, each a mile square* within the

limits of *twenty miles* from the road as a grant, of twenty alternate sections, each a mile square, per mile would require a limit of *forty miles* from the road as only ten alternate sections could be included within the twenty mile limit which is the limit designated by the granting statutes.

Now, we contend that in any view of such recitals, we have the right to go to the record to ascertain what, if any, decision was made by the land department that resulted in the issuance of the patent. If the patent was issued without a record or on an imperfect record the patent becomes imperfect and of no avail.

The court will observe that the patent contains no specification of the character of the land or any statement of its quality. It is absolutely impossible for this court to say from an inspection of the patent what quality of land is conveyed by it and there is absolutely *nothing contained in the patent or record* that will support any presumption that the land was mineral or non-mineral except the statement that the *list* of lands selected by the railroad company were approved by the local land officers at Visalia, California, while it is apparent from the record of the general land office there was no decision at all of the quality of the lands selected by the Southern Pacific Railroad Company by the general land office, and the approval of the local land officers at Visalia, California, was simply

that the records of the local land office contained no adverse claims and that so far as the records of that office showed the list of selected lands *was clear*, only that and nothing more.

We contend that in order to make a patent conclusive as to the quality of the land it attempts to convey there must be included in the patent *a statement of the quality of the land*. This court has said so and has never intimated to the contrary.

The fact that the positive direction of this court in such direction has been disregarded by the ever changing subordinates of the general land office only proves the necessity of enforcing the mandates of this court.

Before passing to the decisions of this court on that subject, it will be well for this court to take judicial cognizance of the physical conditions of the public lands in California at the time of the Act of July 27, 1866, and at the time of the railroad application for a patent to the lands in controversy, namely, May, 1891. That portion of California then as now was arid, sterile, wild, uncultivated, inhabited then only by the prospector and adventurous explorer—without water, little rainfall, without grasses or vegetation; it did not appeal to the settler or homesteader. The main line of the Southern Pacific Railroad Company, originally projected to pass

through that portion of California, had been abandoned, was but a mere stub, finding its ending in what is now the great and wonderful Coalinga oil field. The lands had been surveyed in the shiftless manner that characterized the early western surveys, of the Benson and Hyde surveying contracts, the history of which has been spread on many a record in many a court of civil and criminal jurisdiction.

There had been no decision of the quality of the lands by the land department; there had been no examination or classification of the lands by the department of the interior at that time, and in view of an impending bond issue by the Southern Pacific Railroad Company, then poor and decrepit, now rich and powerful, the defendant railroad company was willing to take a patent on any terms and conditions and accordingly applied for and secured the patent now under consideration.

Prior to the *Barden decision* some of the western judges, and particularly *Judge Sawyer*, were insistent and consistent contenders of and for the proposition that only *known mineral* lands were precluded from passing to the railroad grantees under the various congressional land grants to railroads and that contest was finally carried to this court in the Barden case and for all time settled. A minority of this court strongly contended then that unless

a time and manner was specified at which and by which the question of title could be for all time settled, great uncertainty would result and land titles would remain insecure, and thus it became necessary for this court in the *Barden case* to indicate how the question of the quality of the land could be forever settled and the views expressed by this court in that case have never been changed or modified and the case has been cited *upwards of fifty times.*

The court then said that the question of quality would be settled by the patent, *not by the issuance of a patent*, but by a patent issued after *examination, determination* and with a *statement of the quality of the land embraced in and set forth in the patent.* At page 330 (154 U. S.) this court said:

> "The fact remains that under the law the duty of *determining* the character of the lands granted by congress, *and stating it in the instruments transferring the title of the government* to the grantees, reposes in officers of the land department Until such patent is issued, *defining* the character of the land granted, *and showing it is non-mineral, it will not comply* with the act of congress in which the grant before us was made to plaintiff."

[As we will see later in this brief the defendants were forced to contend that the word "it" did not refer to the "patent" but to the "land department."]

Counsel in the courts below said such "remark" was *obiter dictum,* but if so then all "remarks" relating to a patent and its effect contained in that famous case are *obiter.* But it is not so; the question was necessarily before the court and the issues therein involved could not be decided properly without passing on the effect of a patent to be issued under the railroad land grants.

Again this court in that case, at page 331, said:

> "It (the land department) can hear contestants and decide upon the respective merits of their claims.
>
> It can investigate and settle the contentions of all persons with respect to such claims. It can hear evidence upon and determine the character of lands to which different parties assert a right; and when the controversy before it is fully considered and ended, it can issue to the rightful claimant the patent provided by law, *specifying that the lands are of the character for which a patent is authorized.*
>
> *It* can thus determine whether the lands called for are swamp lands, timber lands, *agricultural lands,* or mineral lands *and so designate them in the patent which it issues.* The act of congress [identical with this act] making the grant to plaintiff provides for the issue of a patent to the grantee for land claimed *and as the grant excludes mineral lands,* in the direction for such patent to issue, the land office can examine into the character of the lands *and designate it in its conveyance.*"

Again this court said in that case, (page 349):

> "It (the land department) *must also decide whether lands are excepted because they are mineral lands,*" and again, page 332, "*The determination* of the fact by these officers that they are the one or the other will be considered as conclusive."

The following is the entire discussion of this subject by the court in that case [pp. 326 to 334]:

> "The earnest contention of the counsel of the plaintiff arises principally, we think, from an unfounded apprehension that our interpretation will lead to uncertainty in the titles of the country. If the exception of the government is not limited to *known* minerals, the title, it is said, may be defeated years after the land has passed into the hands of the grantee, and improvements of great extent and value have been made upon its faith.
>
> "It is conceded to be of the utmost importance to the prosperity of the country that titles to lands and to minerals in them shall be settled, and not be the subject of constant and ever-recurring disputes and litigation, to the disturbance of individuals, and the annoyance of the public. We do not think that any apprehension of disturbance in titles from the views we assert need arise. The law places under the supervision of the interior department and its subordinate officers, acting under its direction, the control of all matters affecting the disposition of public lands of the United States, and the adjustment of private claims

to them under the legislation of congress. *It can hear contestants* and decide upon the respective merits of their claims. It can investigate and settle the contentions of all persons with respect to such claims. It can hear evidence upon and determine the character of lands to which different parties assert a right; and when the controversy before it is fully considered and ended, it can issue to the rightful claimant the *patent* provided by law, *specifying that the lands are of the character for which a patent is authorized. It can thus determine whether the lands called for are swamp lands, timber lands, agricultural lands, or mineral lands, and so designate them in the patent which it issues.* The act of congress making the grant to the plaintiff provides for the issue of a patent to the grantee for the land claimed, *and as the grant excludes mineral lands in the direction for such patent to issue, the land office can examine into the character of the lands, and designate it in its conveyance.*

"It is the established doctrine, expressed in numerous decisions of this court, that wherever congress has provided for the disposition of any portion of the public lands, of a particular character, and authorizes the officers of the land department to issue a patent for such land upon ascertainment of certain facts, and in the absence of fraud, imposition, or mistake, its determination is conclusive against collateral attack.

"In *Smelting Co. .v. Kemp*, 104 *U. S.* 636, 640, 641, this court thus spoke of the land department in the transfer of public lands:

"'The patent of the United States is the conveyance by which the nation passes its title to portions of the public

domain. For the transfer of that title the law has made numerous provisions, designating the persons who may acquire it and the terms of its acquisition. That the provisions may be properly carried out the land department, as part of the administrative and executive branch of the government, has been created to supervise all the various proceedings taken to obtain the title from their commencement to their close. In the course of their duty the officers of that department are constantly called upon to *hear testimony* as to matters presented for their consideration and to pass upon its competency, credibility, and weight. In that respect they exercise a judicial function, and therefore it has been held in various instances by this court that *their judgment* as to matters of fact properly determinable by them is conclusive, when brought to notice in a collateral proceeding. *Their judgment* in such cases is like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable except by a direct proceeding for its correction or annulment. The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned, and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of the public lands, under the law, is entrusted, that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal *in an action of law.*'"

The last portion of the opinion is simply a reiteration of an elementary proposition that in an action of ejectment the legal title must pervail and that a collateral attack may not be made on a *voidable* patent issued within the jurisdiction of the land department and has no application to a suit in equity containing averments constituting a direct attack.

"In *Steel v. Smelting Co.*, 106 *U. S.* 447, 450, the language of the court was that:

" 'The land department, as we have repeatedly said, was established to supervise various proceedings, whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of congress are fully complied with. Necessarily, therefore, *it must* consider and pass upon the qualification of the applicant, the acts he has performed to secure the title, *the nature of the land*, and whether it is of the class which is open to sale. *Its judgment* upon these matters is that of a special tribunal, and is unassailable, except by direct proceedings for its annulment or limitation.' (Another instance of the rule in actions of ejectment.)

"In *Heath v. Wallace*, 138 *U. S.* 573, 585, it was held that:

" 'The question whether or not lands returned as "subject to periodical overflow" are "swamp and overflowed lands" *is a question of fact properly determinable by the land department.*'

"And Mr. Justice Lamar added:

" 'It is settled by an unbroken line of decisions of this court in land jurisdiction, that the *decisions* of that department upon matters of fact within its jurisdiction are, in the absence of fraud or imposition, conclusive and binding on the courts of the country.'

"If the land department must decide what lands shall not be patented because reserved, sold, granted, or otherwise appropriated, or because not free from preemption or other claims or rights at the time the line of the road is definitely fixed, *it must also decide whether lands are excepted because they are mineral lands.* It has always exercised this jurisdiction in patenting lands which were alleged to be mineral, or in refusing to patent them because *the evidence* was insufficient to show that they contained minerals in such quantities as to justify the issue of the patent. If, as suggested by counsel, when the secretary of the interior has under consideration a list of lands to be patented to the Northern Pacific Railroad Company, it is shown that part of said lands contain minerals of gold and silver, discovered since the company's location of its road opposite thereto, *he would not perform his duty,* as stated in *Knight v. Land Association,* 142 *U. S.* 161, 178, as the 'Supervising agent of the government to do justice to all claims and preserve the rights of the people of the United States' by certifying the list until corrected in accordance with the discoveries made known to the department. He would not otherwise discharge the trust reposed in him in the administration of the law respecting the public domain.

"There are undoubtedly many cases arising before the land department in the disposition of the public lands where it will be a matter of much difficulty on the part of its officers to ascertain with accuracy whether the lands to be disposed of are to be deemed mineral lands or agricultural lands, and in such cases the rule adopted that they will be considered mineral or agricultural as they are more valuable in the one class or the other, may be found. The officers will be governed by the knowledge of the lands obtained at the time as to their real character. *The determination* of the fact by these officers *that they are one or the other* will be considered as conclusive.

"In the case of the Central Pacific R. R. Co. v. Valentine, 11 Land Dec. 238, 246, the late secretary of the interior, Mr. Noble, speaks of the practice of the land department in issuing patents to railroad lands. His language is:

" 'The very fact, if it be true, *that the office of the patent is to define and identify the land granted,* and to evidence the title which vested by the act, necessarily implies that there exists jurisdiction in some tribunal to ascertain and determine what lands were subject to the grant and capable of passing thereunder. Now, this jurisdiction is in the land department, and it continues, as we have seen, until the lands have been either patented or certified to or for the use of the railroad company. By reason of this jurisdiction it has been the practice of that department for many years past to refuse to issue patents to railroad companies for lands FOUND to be mineral in character at any time before the date of pat-

ent. Moreover, I am informed by the officers in charge of the mineral division of the land department that ever since the year 1867 (the date when that division was organized) it has been the uniform practice to allow and maintain mineral locations within the geographical limits of railroad grants, based upon discoveries made at any time before patent or certification where patent is not required. This practice having been uniformly followed and generally accepted for so long a time, there should be, in my judgment, the clearest evidence of error as well as the strongest reasons of policy and justice controlling before a departure from it should be sanctioned. It has, in effect, become a rule of property.'

"It is true that the patent has been issued in many instances without the investigation and consideration which the public interest requires; but if that has been done without fraud, though *unadvisedly* by officers of the government charged with the duty of supervising and attending to the preparation and issue of such patents, the consequence must be borne by the government until by further legislation a stricter regard to their duties in that respect can be enforced upon them. The fact remains that under the law the duty of determining the character of the lands granted by congress, *and stating it in instruments transferring the title* of the government to the grantees, reposes in officers of the land department. Until such patent is issued, *defining the character of the land granted and showing that it is non-mineral, it will not comply with the act of congress in which the grant before us was made to plaintiff. The grant,* even when all the acts required of the grantees are per-

formed, only passes a title to non-mineral lands; *but a patent issued in proper form,* upon a judgment rendered *after a due examination of the subject by officers of the land department,* charged with its preparation and issue, that the lands *were non-mineral,* would, unless set aside and annulled by direct proceedings, stop the government from contending to the contrary, and as we have already said, in the absence of fraud in the officers of the department, would be conclusive in subsequent proceedings respecting the title."

To fully understand and appreciate the effect to be given the *Barden case* in holding, as it does repeatedly in the language of the court, that the granting act distinctly reserves and excludes all mineral lands, it is important to observe the distinction which the court makes between the case which it is considering and the two cases referred to in the opinion by Mr. Justice Field, on pages 321, 322, 323, and 324, to-wit: the cases of

Deffeback v. Hawke, 115 *U. S.* 392, *and*
Davis v. Weibbold, 139 *U. S.* 507.

The following is what this court said upon the subject of those two cases:

"There is, in our opinion, no merit in any of the positions advanced by the plaintiff in support of its claim to the mineral lands in controversy. The language of the grant to the plaintiff is free from ambiguity. The exclusion from its operation of

all mineral lands is entirely clear, and if there were any doubt respecting it, the established rule of construction applicable to statutes making such grants would compel *a construction favorable to the grantor.*

"Some reference should be made here to the language used in the cases of *Deffebach v. Hawke,* 115 *U. S.* 392, and *Davis v. Weibbold,* 139 *U. S.* 507, as it is contended that it is in conflict with the views expressed in the present case. If so, the writer of this opinion, who was also the writer of the opinions in both of the cases cited, must take the responsibility of any conflict with the views now expressed. It is more important that the court should be right upon later and more elaborate consideration of the cases than consistent with previous declarations. Those doctrines only will eventually stand which bear the strictest examination and the test of experience.

"The case of *Deffebach v. Hawke* arose in this wise: The plaintiff asserted title to mineral lands under a patent of the United States, founded upon an entry under the laws of congress, for the sale of mineral lands. The defendant, not having the legal title, claimed a better right to the premises by virtue of a previous occupation of them by his grantor as a lot on portion of the public lands appropriated and used as a town site,—that is, settled upon for purposes of trade and business, and not for agriculture, and laid out into streets, lots, blocks, and alleys for that purpose. And it was held by this court that no title from the United States to land known at the time of sale to be valuable for its minerals of gold, silver, cinnabar or copper could be obtained under

the pre-emption or homestead laws, or the town site laws, or in any other way than as prescribed by the laws specially authorizing the sale of such lands. These three cases, those under the pre-emption and homestead laws and town site act, were classed together. It was found that under the pre-emption and homestead act lands containing known saline deposits and mines could not be purchased. In the town site act it was provided that by virtue of its provisions no title could be acquired to any mine of gold, silver, cinnabar or copper, or to any valid n.ining claim or possession held under existing laws. And under the mineral act of congress it was provided that in all cases lands valuable for minerals should be reserved from sale except as otherwise expressly provided. The court held that under those acts land could be purchased which was not known to be mineral; and from this the inference was drawn that only lands known at the time of the sale to be valuable for minerals could be excluded, and if they were not thus known to be valuable for minerals a sale might be had. *This was not a case arising upon a grant like the one under consideration at present;* but, inasmuch as the law of congress authorized lands valuable for minerals to be sold generally under the mineral act, and excluded from sale mineral lands when claimed for homesteads or pre-emption or for town sites, it was thought that these conflicting provisions of law would be reconciled by simply excluding from the sale lands known at the time to be mineral. *But that case has no bearing upon the present one involved the construction of an act of congress declaring in express terms that no mineral lands shall be conveyed by the grant made.*

"The case of *Davis v. Weibbold* was an action on the part of a mineral claimant who had obtained a patent in January, 1880, of a parcel of land within the exterior limits of Butte town site, subsequently to the patent for the town site.

"When the entry of the town site was had and the patent issued, and a sale was thereafter made to the defendant of the lots held by him, it was not known—at least, it does not appear that it was known—that there were any valuable mineral lands within the town site, and the question was whether in the absence of this knowledge the defendant, who claimed under the town site patent, could be deprived by the laws of the United States of the premises purchased and occupied by him, because of a subsequent discovery of minerals in them, and the issue of a patent to the discoverer under whom the plaintiff claimed. The court said that the declaration that no title could be acquired, under the provisions relating to such town sites and the sale of lands therein, to any mine of gold, silver, cinnabar or copper, or to any valid mining claim or possession held under existing laws, would seem on first impression to constitute a reservation of such mines in the land sold, and of mining claims on them, to the United States; but such was held not to be the necessary meaning of the terms used; in strictness they imported only that the provisions by which the title to the land in such town sites was transferred should not be the means of passing a title also to land, or to valid mining claims or possessions thereon; but that they were to be read in connection with the clause protecting existing rights to mineral veins; and with the qualification uniformly accompanying

exceptions in acts of congress of mineral lands from grant or sale. Thus read, the court held that they merely prohibited the passage of title under the provisions of the town site laws to mines of gold, silver, cinnabar, or copper, which were *known to exist on the issue of the town site patent and to mining claims and mining possessions*, in respect to which such proceedings had been taken under the law or the custom of miners, as to render them valid, creating a property right in the holder, and not to prohibit the acquisition for all time of mines which then lay buried *unknown* in the depths of the earth. The patent, for the town site was therefore held to cover minerals subsequently discovered in the lands patented. The patent was in law a declaration that minerals did not exist in the premises when it was issued, and the subsequent acquisition of minerals, in the town site was within the specific authorization of the act of congress that all valuable minerals should be open for exploration and sale. *There is a marked distinction between that case*, under the town site law, *and the present case, under a grant of congress excluding mineral lands from its operation*, although it is conceded that some of the language used is broader than the necessities of the case required. *Yet the effect* given to the town site patent will be found not inconsistent with the views hereafter expressed in the present case."

Mr. Justice Brewer lead the minority of this court in the *Barden* case but later, as was his duty, became reconciled to the decision and cited it on this very question in *Shaw*

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v. Kellogg, 170 *U. S.* 312-341 when he pointed out that it was the duty of the land department to *examine into and determine the quality of the* land before the issuance of the patent and to *express in the patent that the land is non-mineral* before a grant of agricultural land passes unassailably to the grant.

No modification of the decisions of this court are to be found except in the utterances of a subordinate of the land department who in 1904, in writing an opinion on the *ex parte* and uncontested application of a land grant railroad said:

> "If any statement in this connection (statement of quality of land) were deemed necessary in the patent, *which is not believed to be the case,* it should be to the effect *that the lands patented are found to be non-mineral in character and otherwise subject to the grant.*" (39 L. D. 342 per Mr. Hall.)

Otherwise the decisions of this court on such subject stand unharmed and unimpugned though as a matter of fact Mr. Hall, so far as the land department is concerned, "recalled" the decisions of this court much to the gratification of the land grant railroads!

1. THE PATENT ISSUING WITHOUT EXAMINATION, OR ADJUDICATION AS TO THE AGRICULTURAL QUALITY OF THE LANDS IS NOT CONCLUSIVE NOR RES JUDICATA ON THAT QUESTION AS THE FACT OF QUALITY WAS NEVER ADJUDICATED NOR PASSED ON TO AN ACTUAL DECISION!

Leonard v. Lennox, 181 *Fed.* 760;
U. S. M. Co. v. Lawson, 134 *Fed.* 775-6 *aff* 207 *U. S.*;
Montana etc. v. St. Louis, 102 *Fed.* 430;
Nesbit v. Riverside Independent District, 144 *U. S.* 610;
Roberts v. N. P. R. R. Co., 158 *U. S.* 1;
Board of Com. v. Sutliff, 97 *Fed.* 270;
Board of Com. v. Platt, 79 *Fed.* 567;
Linton v. National, etc., 104 *Fed.* 584;
Aetna v. Board, etc., 117 *Fed.* 82;
Last Chance etc. v. Tyler etc., 157 *U. S.* 687;
23 *Cyc. (Notes) p.* 1223, *etc.*

A. THERE MUST BE SOME EVIDENCE ON WHICH AN ACTUAL FINDING IS MADE TO MAKE A PATENT CONCLUSIVE AS TO THE QUALITY OF THE LAND.

Love v. Flahive, 33 *Mont.* 348;
U. S. v. Minor, 114 *U. S.* 233;
Parsons v. Venzke, 61 *N. W.* 1036 *aff* 164 *U. S.* 89;

Jordan v. Smith, 12 *Okla.* 703;
Hartwell v. Havinghorst, 196 *U. S.* 635;
affirming 11 *Okla.* 189, *which contains the facts.*

In every case that may be cited by the appellees in the subject it will be found there had been an *actual decision* in the land office before the issuance of patent.—*Counsel will not produce,* council cannot produce the land office record of any of their citations that will not show there had not been an actual determination and formal decision as to the quality of the land antecedent to the issuance of the patent.

Puget Mill Co. v. Brown, 54 *Fed.* 987;
U. S. v. Coos Bay etc., 89 *Fed.* 151;
Wharton on Evidence, Sec. 822;
Potter v. Randolph, 126 *Cal.* 461-2;
Cragie v. Roberts, 6 *Cal. App.* 309-12;
U. S. v. Mackintosh, 85 *Fed.* 333.

To lighten the labors of the court we will briefly digest the cases bearing on the subject.

1. *The Steele case,* 106 U. S. 447:

"Necessarily, therefore, it (the land department) must consider and *pass* upon the qualifications of the applicant, the acts he has performed to secure the title, the *nature of the land* and whether it is of the class which is open to sale. *Its judgment*

upon these matters is that of a special tribunal and is unassailable except by direct proceedings for its annulment or limitation."

Could language be plainer? *Must pass on the questions and render a judgment?* Does that mean the department *may* not pass on the questions, need not render a judgment but that a mere patent free from any statement or recital or any record is conclusive that the things that were not done, were done?

2. *The Burfenning case,* 163 *U. S.* 321:

"Whether, for instance, a certain tract is swamp land or not, saline land or not, mineral land or not, *presents a* question of fact, *not resting on record, dependent on oral testimony;* and it cannot be doubted *that the decision* of the land department, one way or the other, *in reference to these questions is conclusive.*"

That is the test—*a decision* whether the land was mineral or not and the decision is *res adjudicata.*

3. *N. P. R. R. Co. v. Sanders,* 166 *U. S.* 620:

"Whether the lands sought to be purchased as mineral lands were of that character *was a matter for determination* in the first instance by the land department."

4. In the *Barden case*, 154 U. S. 328-9, it was said:

> "If the land department *must decide* what lands shall not be patented because reserved, sold, granted or otherwise appropriated, or because not free from pre-emption or *other claims* or rights at the time of the lien is definitely fixed, *it must also decide* whether lands are excepted because they are mineral lands. It has always exercised this jurisdiction in patenting lands which were alleged to be mineral or in refusing to patent them *because the evidence was insufficient to show* that they contained minerals, etc."

If the land department is required by law *not* to issue a patent until it *has* actually passed on and decided the quality of the land, is not such a patent *void* as it issued in violation of law.

There was *no* evidence *even* offered by the S. P. R. R. Co. at any time before the issuance of the patent.

5. *Wright-Roseberry case*, 121 U. S. 488:

> "2. The *action* of the secretary of the interior in identifying such lands is conclusive against collateral attack; but when he has neglected or failed to make the identification it is competent for the grantees of the state to protect their rights from being defeated, to identify the lands in any other appropriate method."

In that case the court permitted a collateral attack to be made on a pre-emption patent by showing that the lands were swamp and had passed to the state under a previous grant and the patentee of the state defeated the federal patent by showing the secretary of the interior had failed to pass on the quality of the controverted land. Under this case what becomes of the claim *that the mere* issuance of the patent is conclusive or that the secretary passed on and determined the land to be agricultural and not swamp *prior to the time he issued the pre-emption patent?*

6. *Ehrhardt v. Hogaboom,* 115 *U. S.* 67:

The Supreme Court said it was the duty of the secretary of the interior to *determine the quality of the land.*

7. *French v. Fyan,* 93 *U. S.* 169:

> "But a careful examination will show that it (decision in R. R. Co. v. Smith, 9 Wall. 95) was done with hesitation and some dissent in the court. *The admission* (of testimony) was placed expressly on the ground *that the secretary had neglected or refused to do his duty* * * * the matter to be shown is one of *observation and examination*, whether arising before the secretary whose duty it was to primarily *decide it*, or *before the court*, whose duty it became because the secretary had failed to do it. * * * "

"That is our position exactly; without any action of any kind; without any investigation, without decision, the patent issued."

8. The rule of the *Borden case*, 154 *U. S.* 326-331, the only rule applicable to land grant cases and land grant patents is:

> "*The fact remains that under the law the duty of determining* the character of the lands granted by congress and *stating it in instruments* transferring the title of the government to the grantees, reposes in officers of the land department until such patent is issued *defining the character* of the land granted and *showing it is non-mineral* it will not comply with the act of congress in which the grant before us was made to plaintiff. The *grant*, even when *all* the acts required of the grantees are performed, *only* passes a title to non-mineral lands; *but a patent issued in proper form, upon a judgment* rendered after a *due examination* of the subject by officers of the land department, charged with its preparation and issue, *that the lands were non-mineral* would unless set aside and annulled by direct proceedings, etc."

At another place in the opinion the court said:

> "*It can hear contestants* and *decide* upon the respective merits of the claims. *It can investigate* and settle the contentions of all persons with respect to such claims. It can *hear evidence* upon and

determine the character of the lands to which different parties assert a right; and when the controversy before it is *fully* considered and ended it can issue to the rightful claimant the patent provided by law, *specifying* that the lands *are of the character* for which a patent is *authorized*.

"It can *thus determine* whether the lands called for are swamp lands, timber lands, agricultural lands or mineral lands *and so designate them in the patent* which it *issues*. The act of congress making the grant to the plaintiff provides for the issue of a patent to the grantee for the land claimed *and as the grant excludes mineral lands* in the direction for such patent, the land office *can examine into the character of the lands and designate it in its conveyance.*"

The court below did not attempt to construe adversely this ruling which is as plain and positive as the language of the Federal Supreme Court could make it and which is the language that must be followed. No reference was made to it in the Circuit Court but at one point in its opinion the court said there was no patent before the Supreme Court in the *Barden* case for its consideration; true, but the granting act required a patent to issue, and in the relied on and cited *Shaw-Kellogg* case there was no *patent* for consideration before the court and, what is more, no *patent* was required or permitted by the Baca grant and it is difficult to see how the misconstrued *obiter* remarks of Mr. Justice

Brewer concerning a patent not before the court, should have such great weight, and the remarks of Mr. Justice Field concerning the form and nature and effect of a patent that must issue under a grant under consideration by the court should have no weight at all! If the *obiter* remarks of Mr. Justice Brewer in a "known" mineral land case that required no patent are so potential as affecting an "unknown" mineral land case issuing under a railroad land grant, why not stop to ponder over his express citation from and endorsements of the Barden rule concerning patents when he speaks in Shaw v. Kellogg (p. 339) of the necessity of an *examination of the character of the land by the interior department* and *expressing and stating in the patent that the land is non-mineral* before a grant of agricultural lands is unassailable collaterally or otherwise. It seems to us there may be no mistake arising from this language.

Then again, no patent adjudication was required in the Shaw-Kellogg case. Mr. Justice Brewer in that case aptly said there was no magic in the word patent; the title in that case finally passed when the grantees made their selection and that selection was approved in the manner required by congress. That ended the matter. The court could not review the action of the land department in cases arising under Mexican grants or under treaties. There was a

trial, a hearing, proofs, examinations, actual adjudications and actual exterminations of all questions affecting a *grant* that *only* excluded *known* mineral land—of land *known* to be mineral at the time of the selection and approval, and of course it would be absurd to contend that after such an adjudication there could be a limitation of the grant by a reservation of "unknown" mineral lands which were *not* precluded by the Baca grant and which was, as pointed out by Justice Brewer, analogous to homestead, pre-emption and townsite grants which precluded only "known" mineral lands from their respective grants.

Counsel, driven to extermity in the court below as to the want of examination or determination of the quality of the land, argued that there were a multitude of cases holding that adequate examination is presumed by the *issuance* of the patent and *that the patent (not its contents) is the determination and expression of quality,* and that the *issuance* of the patent under any "particular" grant is the *"expression and statement"* that the land is of the character contemplated by the grant and constitutes a final declaration by the government that all requisite preliminary steps have been taken and that to state the facts in the patent would be superfluous (although the *Barden* and *Shaw-Kellogg* cases say a "statement" must be inserted), and to support this view the well known rule

of presumption of regularity was cited and with it the cases of *Minter v. Crommelin,* 18 How. (U. S.) 87; *the Kemp case,* 104 U. S. 636 (which restricts the rule to cases arising in a *court of law?*); the *Moffat case,* 112 U. S. 24; the *Steel case,* 106 U. S. 450, *and the opinion of Judge Ross in Doe v. Mining Co.,* 54 F. 935, and some other cases to which we will refer.

The answer to the proposition so advanced is:

1. That in all the cases cited there had been actual investigation and actual proof offered of the facts *determined* and the antecedent rulings so made could not be attacked collaterally either on the ground of *falsity* or *insufficiency of proof,* etc., except in case of fraud, imposition and mistake, the fraudulent patentee would be charged as trustee for the rightful owner.

2. In all the patents issued in all the cases cited by the demurring defendants it will be found *they were based on records and findings of fact made up before the patent issued* and that all patents that have so been held as conclusive contained proper and conclusive recitals under a perfect record, and the entire case is all summed up in the case of *De Cambra v. Rogers,* 189 U. S. 119, in which it was contended that a decision rendered in a *contest* in the interior department between two pre-emption claim-

ants was not conclusive because the secretary had not heard or read the testimony but he had simply signed his name to a decision made up in the department. The Supreme Court said:

> "It is hardly necessary to say that *when a decision has been made by the secretary of the interior,* the court *will not entertain an inquiry as to the extent of his investigation and knowledge of the points decided or as to the methods by which he reached his determination.*"

That is our exact contention! As was said in the *Winona case,* 67 F. 948:

> "The test of jurisdiction is whether the tribunal has power to *enter on the inquiry, not whether its conclusion was right or wrong.*"

That is the exact situation here—*that there was no inquiry—that there was no conclusion!* There must be a *perfect* record to make the patent conclusive.

Let me illustrate: Suppose the department had issued a patent for land earned by alleged construction of eight twenty-five mile sections of railroad when no construction had been entered on at all and there had been no investigation or determination, would the patent be a conclusive determination that two hundred miles of railroad had been constructed and in operation? It would not be possible to attack the

patent in such instance in an action of ejectment but in a direct attack either by the United States or by one in privity with the paramount title the rule would not be applicable.

This court said in *Brown v. Huger*, 21 *How.* 305, and *Broadman v. Reid*, 6 *Pet.* 345, *that a patent must only be issued on a legal record*, and must be *interpreted* as a whole. If the mere issuance of a patent is conclusive of all jurisdictional facts, it would further appear that the rule is only applicable in courts of law, in actions of ejectment, and that it has no application to a suit in equity.

In this connection the thought occurs to us that a patent is not any more solemn nor conclusive than the judgment of the Circuit Court of the United States would be in our action to quiet title, and in that court *only the actual facts* determined would be conclusive and *res adjudicata*, and it must be remembered that the patent (appendix D) clearly shows there is no reference to any quality, and the words *"not mineral"* are omitted in the purported recital of *the Act of July 27, 1866.* Under our overments our suit to quiet title is purely equitable in its nature as the defendant being out of possession are not, under the California rule, entitled to a trial by jury.

The demurrer admits that the patent is not based on a record of examination and adjudication, and it appears affirmatively on the face of the patent that there was no adjudication, express or implied, that any particular legal subdivision of the land described in the patent was non-mineral. The defendants, as we have seen, contend that the issuance of the patent was an implied determination and adjudication of the land department that all of the land was non-mineral in character. The contention is conclusively refuted by the language of the patent, which unmistakably shows that there was no such determination; *that the land department, acting in accordance with its then settled practice of forty years, based upon a construction of the statute,* instead of determining whether any particular legal subdivision of the land was mineral or non-mineral, expressly excepted all mineral land, if any such should be found. It is absurd, in the face of this exception, to contend that there was a determination and adjudication that all the land was non-mineral. For it is not, and never has been, the law that a judgment, order or adjudication is *res adjudicata* as to any matter which, from an inspection of the record it appears was not passed on or decided,—and this, even though the court or officer had *authority to,* and under the pleadings *might have,* determined such question. Such question or fact is not *res adjudi-*

cata, for the reason that the record shows affirmatively that the point or fact was not decided or determined.

It is a rule of universal application that where it appears on the face of the judgment that certain matters were not adjudicated, the judgment is not *res adjudicata* as to such questions. The fundamental principle that for a judgment to be *res adjudicata* it must appear that the precise question in issue arose and was determined in the former suit is well settled. In *Russell v. Place*, 94 *U. S.* 606, 608, *the court said:*

> "It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record,—as, for example, if it appears that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered,—the whole subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made,

when the record leaves the matter in doubt, such evidence is admissible."

And in *Packet Co. v. Sickles*, 5 *Wallace* 580, 592, the court said:

"As we understand the rule in respect to the conclusiveness of the verdict and judgment in a former trial between the same parties, when the judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive, *per se*, it must appear, by the record of the prior suit, that the particular controversy sought to be concluded was necessarily tried and determined—that is, if the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties; and further, in cases where the record itself does not show that the matter was necessarily and directly found by the jury, evidence *aliunde* consistent with the record may be received to prove the fact; but, even where it appears from the extrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination, it will not be concluded."

A claim that the matter in issue has already been passed upon by the court in a former action cannot be sustained in the face of a record from which it expressly appears that the matter was not passed upon.

Thus in *Central Trust Co. v. Clark,* 81 *Fed.* 269, 273, (C. C. A., 8th Circuit), the facts are thus stated:

> "One C. brought an action against the D. R. Co. to recover the price of a certain machinery. A counterclaim for damages for delay in delivery was put in. Pending this suit, proceedings were taken to foreclose a mortgage on the railroad. C. obtained judgment against the railroad company, and also intervened in the foreclosure suit, claiming a preference for the price of his machinery over the bonds secured by the mortgage. It affirmatively appeared by the record of C's judgment that the issue raised by the counterclaim was never tried in that suit, and that the receivers appointed in the foreclosure suit were never made parties to it. *Held,* that the receivers were entitled to show, if they could, that the railroad company had been damaged by a delay on C's part in delivering the machinery."

The court said:

> "We may concede for present purposes that if the record in the New York suit showed that the merits of the alleged counterclaim had been investigated and determined in that suit, or even if it was silent on that subject, no further trial of that issue could be permitted; but, inasmuch as the New York record sows affirmatively that the issue with respect to the non-delivery of the gear wheel within the time limited was not in fact tried and determined, we are of opinion that it is a proper subject for consideration in the present proceedings. We rest our conclusion on this point, not alto-

gether on the ground last indicated, but upon the principle that one who seeks relief purely upon equitable grounds should himself do what is equitable. In the present proceedings the intervenor interposes a claim against the proceeds of the mortgaged property, and insists that it shall be paid prior to the mortgage indebtedness, not, however, because he has a lien upon the mortgaged property such as a court of law would recognize and enforce, but because of the circumstances under which certain machinery was supplied to the railway company. The intervenor himself has no standing in court to maintain his claim to a preference without going behind the New York judgment, and showing the origin and nature of the demand on which the judgment rests. When, therefore, he invites an investigation of those questions for the purpose of establishing an equitable right to which the judgment alone would not entitle him, we think that the mortgage bondholders should be permitted to show, if they can, that they were not benefited to the extent of the full value of the machinery which was supplied to the railway company, but, that, by reason of the failure to deliver the same within the contract period, the company sustained some loss."

Condon v. Knoxville, etc. R. Co. (Tenn. Chancery Appeals) 35 *S. W.* 781, 783, is a case in which the court relied almost entirely upon federal decisions, and the opinion is very strong. The court said:

"The judgment of a court of competent jurisdiction upon a point or question litigated between the parties is

conclusive in all subsequent controversies between the same parties or their privies, depending on the same point or question. * * * And 'the plea of *res adjudicata* applies to every objection urged in a second suit, when the same objection was open to the party within the legitimate scope of the pleadings in a former one, and might have been presented in it.' *Aurora City v. West*, 7 *Wall.* 96. But the principle as thus announced is not at all in conflict with statements made in previous and subsequent decisions of that eminent court, attaching proper limitations or making specific modifications of the scope and extent of *res adjudicata* as evidence, or as a technical estoppel. * * * And it is true that the estoppel is not confined to the judgment, but extends to all steps involved in it as necessary steps, or the groundwork upon which it must have been founded. So it may be said that "it is allowable to reason back from a judgment to the bases on which it stands, upon the obvious principle that where a conclusion is indisputable, and could have been drawn only from such conclusion.'

Burlen v. Shannon, 99 *Mass.* 200;
Scotland Co. v. Hill, 112 *U. S.* 183, 5 *Sup. Ct.* 93;
Boyd v. Alabama, 94 *U. S.* 645.

"And when not in conflict with the record, proof *aliunde* may be received to show what was decided, and when thus shown it will be an estoppel as *res adjudicata.*

Doty v. Brown, 53 *Am. Dec.* 350,
and authorities cited.

Russel v. Place, 94 *U. S.* 606;
Warwick v. Underwood, 3 *Head* 238.

"But we deny that any case, either from the courts of the United States or elsewhere, governed by the general principles of the common-law jurisdiction, goes to the extent of holding that a judgment of a competent court having jurisdiction of the parties and subject-matter is *res adjudicata* as to matters and issues which it did not decide, but which, from the face of its record, it refused to decide and excluded from its decision, although under the pleadings it might have decided, and had the right to decide.

Packet Co. v. Sickles, 5 *Wall.* 592;
Aurora City v. West, 7 *Wall.* 96;
Cromwell v. Sac. Co., 94 *U. S.* 351;
Russel v. Place, *id.* 606;
Davis v. Brown, *id.* 423;
Lea v. Lea, 96 *Am. Dec.* 772.

and extended note."

In *Hamlin v. N. Y. etc. R. Co.*, 176 *Mass.* 514, 57 *N. E.* 1006, it was held that in a proceeding to determine whether or not a railroad company has the right to maintain gates across an alleged right of way, a final decree for the complainants in a former proceeding is not available as a bar where the right to maintain the gates was left open by the decree in such proceeding. The court said:

"The rulings excepted to were right. The pleas set up the original bill and the proceedings thereon as a bar to the present bill. But the question whether

the defendants have a right to maintain gates at the crossing was left open by the proceedings pleaded in bar. The final decree in favor of the plaintiffs in those proceedings, which decree was ordered affirmed by this court, was 'without prejudice to the rights of the defendants, if any they have, to maintain proper gates or bars across said way,' and the decree entered after the decision of this court under its rescript was 'without prejudice to any right of the defendants to maintain proper gates or bars across said way.' The defendants' exceptions are therefore overruled."

In *People v. Hall*, 104 *N. Y.* 170, 177, the court uses this language:

"The remaining question arises in respect to the estoppel of the former judgment. The prior action was founded upon the title of the relator under his prior nomination and appointment of January 15th, 1885. The defendant set up, as in this case, his appointment of February 7, 1884. Judgment was rendered in that action against the relator and in the favor of the defendant. It is now insisted that the judgment is conclusive that the appointment of Hall was for the full term of three years from February 7, 1884. It is clear that this point was not adjudicated on the face of the judgment. On the contrary, the judgment, while affirming the title of the defendant to the office, expressly declares that it was not decided, nor intended to be decided, whether he was legally chamberlain under a temporary appointment, or under an appointment for a full term of three years."

In *Converse v. Davis*, 90 *Tex.* 462, the court said:

> "While the *prima facie* effect of a general decree is to adjudicate every issue raised by the pleadings, it has never been held in any case that we are aware of that a decree adjudicates any issue which the court therein expressly excludes from its determination. The fact that it appears from the face of a decree that it did not dispose of all the issues might in some cases show that it was not final, but it could not have the effect of broadening its scope, so as to make it effective as an adjudication of the undisposed of issues."

In *Groesbeck v. Crow*, 91 *Tex.* 74, 40 *S. W.* 1028, 1029, the court says:

> "The allegations in the petition show that the issue presented therein —that is, the right of the plaintiffs in this suit to have the deed in question set aside because of the fraud committed upon them by the parties to the said transaction—was not decided by the court in that case, but that the said judgment expressly excluded that issue from the determination of the court. The judgment in the former suit under these circumstances constituted no bar to the action of plaintiffs in this case."

The two latter cases were followed in *Haralson v. St. Louis, etc. R. Co., Tex. Civ. App.*, 62 *S. W.* 788.

In *Faison v. Grandy*, 128 *N. C.* 438, 38 *S. E.* 897, 899, the court says:

"The defendants further insist that the plaintiff is estopped by the judgment rendered by Judge Boykin from claiming that the sum owing by him was less than $14,000 and interest. But in what way, we are not able to see. The judgment expressly provides that 'all the issues relating to the questions of usury have been reserved by consent, to be hereafter passed on by any referee who may be appointed to state an account in this action. * * * And W. R. Allen was appointed referee and ordered 'to pass upon the issues raised by the plea of usury, and report his findings and rulings,' etc., which he has done; and his report is here on appeal by plaintiff from the judgment rendered thereon by Judge Brown confirming the same."

In *Martin v. Turner (Ky. Ap.)*, 115 *S. W.* 833, 834, the court said:

"Preston Turner relies on the judgment rendered at the September term, 1900, in the consolidated actions then pending in bar of these actions; but that plea is not well taken, for the reason that in those cases all questions between Job Martin and Preston Turner were left open for further adjudication. The court there not having determined these matters, and having expressly reserved them, that judgment is not a bar now to their determination upon the merits."

In *Vicksburg S. P. R. R. Co. v. Tibbs*, 112 *La.* 51, 36 *Southern* 223, 224, the court said:

> "Dealing with the pleas of *res adjudicata* and estoppel, as predicted by the defendants upon the judgment in the Turner case, it will be observed that by an interlocutory ruling sustaining an objection urged by them, the judge of the Circuit Court held that the issue before the court in that case concerned only the title to the particular parcel of land occupied by Turner, and that the title to the remainder of Silver Lake Tract was not involved; and it will also be observed that in the Supreme Court of the United States the defendant asked for and obtained the same ruling, and that the final judgment of that august tribunal decides no other question than that the title to the property here in dispute was not there at issue. Under these circumstances we are unable to follow the reasoning by which the defendants endeavor to show that the judgment in the Turner case constitutes *res adjudicata* with respect to that title."

In *Baker v. Williams Banking Co.*, 42 *Ore.* 213, 70 *Pac.* 711, the principal point in issue was whether an order of a probate court was such a judgment or decree as could be relied upon as *res adjudicata*. The court held that it was such a judgment, but concludes that it was not *res adjudicata* in the particular case, the reason that

> "the order itself indicates that the court did not intend to pass upon that question, but reserved it for further consideration."

See also:

2 Black on Judgments, Sec. 616 *et sep.;*

Cox v. Von Ahlefeldt, 105 *La.* 543, 30 *Southern* 175-182;

St. Joseph Union Depot Co. v. Chicago, etc. R. Co., 89 *Fed.* 648;

Fayerweather v. Ritch, 88 *Fed.* 713.

Recurring again to the question of the conclusiveness of a mere patent issued *without a supporting record,* we find that Judge Ross in a measure followed an opinion rendered by himself in *Doe v. Waterloo Mining Co.,* 54 *Fed.* 935, but in that case there was merely an attempt to attack the *sufficiency* of the testimony on which the patent issued, and the case is radically different by reason of the fact that there was an ample record of the *ascertainment* of all jurisdictional facts necessary to justify the decision resulting in a patent, and in connection with the dual opinions of Judge Ross in this connection let us illustrate by saying: Suppose utterly without any location, discovery or assessment work, payment, application at the local land office, mineral surveys, publication, etc., and even without false testimony concerning such facts, the land department should issue to John Doe a mining patent without recitals, statement or expression, would such a patent be conclusive against a prior locator or a relocator and a conclusive source of

title? If so, the law "moves in mysterious ways its wonders to perform" and perplexes its votaries who do their best to live up to the tradition that it is fixed science. We assume that what Judge Ross meant to say was that if the ordinary course had been followed and the ordinary proofs made the judgment rendered therein culminating in the issuance of a patent would not be subject to collateral attack under allegations of falsity, for, as he said in the Doe case, "The very purpose of the patent is to do away with the necessity of *going back to the facts upon which it based.*" We have no contention with such a proposition, as in our case *"there were no facts on which the patent was based."* In fact, there is here neither a collateral nor a direct attack on the patent under the second question, but an insistence on the intent and integrity of the patent, and that it shall be given effect according to its terms; that is, *that it did not carry mineral lands but that the title to the same remained in the federal government* and this position distinguishes it from the multiplicity of cases cited by the defendants in the court below as to the conclusiveness of the patent and its immunity from collateral attack. Such an attack means where you attack and attempt to destroy, nullify or neutralize some finding of fact, some adjudication or judgment based on testimony relating to some particular fact or judgment based on the facts proven and in reality may only arise in cases

of fraud, imposition or mistake in suits instituted by some aggrieved or defrauded party in touch or in privity with the antecedent title, not necessarily the paramount title, except where the antecedent title is the paramount title. This view is evidenced by the mass of inapplicable cases cited in the court below by the demurring defendants. Take, for instance, their citation from the Kemp case (104 U. S. 646): "A patent, *in a court of law, is conclusive as to all matters properly* determinable by the land department when *its action* is within the scope of its authority; that is, when it has jurisdiction to convey the land." The department had *no* jurisdiction to convey the land unless it was *non-mineral* and if the department did *not* so determine *it follows the patent did not pass the title.* Again, the court says in the same case: "In that court *(a court of law)* the patent is unassailable for *mere errors of judgment.*" All this presupposes a "judgment," "decision," "determination" or language means nothing. This view is amplified by the further reasoning of the court in that case:

> "According to the doctrine thus expressed and cases cited in its support—*and there are none* in conflict with it—there can be no doubt the court below erred *in admitting the record of the proceedings upon which the patent* was issued in order to impeach its validity. The judgment of the department *upon their sufficiency* was not, as already seen, open to contention. If

in issuing a patent its officers took mistaken views of the law *or drew erroneous conclusions* from *the evidence,* etc., etc., *a court of law* can afford no remedy."

It will be seen that in the *Kemp case* there was a record on which the patent had issued; there had been a hearing and determination and of course it would be incompetent to attack the record, evidence given and judgment rendered therein in a *mere action of ejectment in a court of law.* The *Kemp case,* like the *Steele case,* its companion in arms, is illustrative only of the two single propositions which are not at this bar, namely: That (1) proceedings to annul or to control or charge patents with a trust for fraud, imposition or mistake cannot be maintained *in a court of law,* but (2) an injured party in privity with the antecedent title may obtain relief in *a court of equity.* Under no possible construction may they or kindred cases (and there are a hundred or more) be applied to a patent issuing without examination or determination at the instance of a party who applied for the same.

As we said in the court below, there must be *some proof, some adjudication* of the particular fact. Assume, for instance, that the department had embraced in the patent (containing no recitals) the land on which the Los Angeles federal building stands. Would the presumption arise that the land was agricultural

within the limits of the railroad grant? And this view is intensified by the defendant's citation in the court below of *Vance v. Burbank*, 101 *U. S.* 514, in which it was said:

> "*False testimony or forged documents* even, are not enough if the disputed matter *has actually been presented and considered* by the appropriate tribunal. (*U. S. v. Thockmorton*, 98 *U. S.* 61; *Marquis v. Frisbee, supra.*) The *decision* of the proper officers of the department is in the *nature* of a *judicial determination* of the matter in dispute."

Just consider that proposition. There must have been a presentation, a trial, a hearing and a determination and then it matters not (except to the government or to those in privity with the antecedent title) whether false testimony was used. No doubt about that contention; it is our contention, but the false testimony or forged document *must have been used* in the hearing, otherwise nothing was decided and the time has not arrived when nothing means any more that *nil* and *res adjudicata* may not be based on nothing.

The railroad company agrees with the government that it shall have no mineral land and that it will take excepted and reserved patents without examination of or determination of the quality of the lands and for twenty-four years stands by that agreement. Sud-

denly the mineral lands become of greater value than the entire railroad system and at once the agreement of twenty-four years is void, the exception nugatory and the lands *must* be presumed to be agricultural under a learned contention that what is not really is, and what is, as a matter of fact, really is not—that decision means no decision and no determination means that something was determined or *vice versa*; that the court must, in the face of the record of the mining locations and of the facts admitted by the demurrer, assume that the mining locations did not exist, that they were dreams or myths and that all parts of the patent that protect the immoral claims of the railroad company are valid and these parts that bear against it are void or as counsel said in the court below: "*It* (the court) *will presume, in short, any state of facts which are necessary to sustain the validity of the patent,*" and this in face of the mandatory rule laid down in the Soderburg case, 188 U. S., that the construction must be against the grantee and in favor of the United States.

Mr. Justice Van De Venter, while at circuit, had occasion to pass on the effect of a patent issued by the land office and of its force and effect as against claimants for the same land in other proceedings and in *U. S. Mining Co. v. Lawson*, 134 *Fed.* 775-6, he said:

"Whether the determination proceeded from a failure, of the then

owner's of complainant's claims to file an adverse claim or from *actual* inquiry and *decision* respecting the right of possession *is not shown,* so it cannot be said and it is not insisted that in course of the *patent* proceedings *there was an actual issue, trial or decision* respecting the order in which the conflicting claims were located or that the patenting of the areas within the overlapping boundaries were *actually* rested on privity of location.

Treating the patent proceeding as involving or as equivalent to a controversy *between* the parties or their predecessors in intent and title, the subject matter of that controversy was the surface conflict between their respective claims, while the present controversy is interlateral underground rights, not necessarily the surface conflict, which is essentially a different subject matter, and *could not* have been made the subject of an issue, trial or decision made in the *course of the patent proceeding. (Montana, etc. v. St. Louis, etc.,* 42 *C. C. A.* 415-417, 102 *Fed.* 430.)

The case is thus clearly within the rule in respect to estoppel by judgment —that where the subsequent action involves a different subject matter, the judgment in the prior action is not conclusive as to every matter which could have been offered and received to sustain or defeat the claim therein, *but only as to the matters actually litigated and determined,* * * * (citing, *amongst others, Last Chance Mining Co. v. Tyler Co.,* 157 *U. S.* 683-687), and Mr. Justice Van De Venter proceeded to say:

"The particular matter in controversy in the adverse suit was the triangular piece of ground, which is not the matter of dispute in this action.

The judgment in that case (patent proceeding) is, therefore, *not* conclusive in matters *which* might have been decided, *but only as to matters which in fact were decided.*"

How were such "matters" ascertained? Only in one way—by going behind the patent and searching the record on which it was based. Judge Van De Venter then continued "the *estoppel* was sustained, but it was because of the superiority of right, asserted and upheld *in the course of the patent* proceedings had been expressly based on the single fact of privity of location. The facts were these:

"The owner of one claim applied for a patent and the owner of the other filed an adverse claim and commenced an action to determine the right of possession in the area. The judgment in that action was for plaintiff and the reason why it was held to operate as an estoppel in the subsequent action involving in a *different* subject matter is shown in the following exhibit which has reference to the former action:

"The single ground stated in the complaint upon which superiority of right is claimed is priority of location. A judgment for the plaintiff upon such a complaint is necessarily an adjudication in favor of that priority of location. There is no other fact upon which it may rest. It is doubtless true, as suggested, that, other questions may be litigated

in an adverse suit, but they can be litigated only when they are presented to the attention of the court by some appropriate pleading. The only pleading upon which the case *passed to trial* and judgment was for the complainant, and in that, as we have seen, plaintiff's right to recover is rested upon the single fact of priority of location."

"We think," continues Judge Van De Venter, "it is manifest from the extracts quoted and from the opinion as an entirety, that the court recognized that superiority of right is not always or necessarily controlled by priority of location; *otherwise the court* could not have inquired and determined with such care whether the question of priority of location *had been in fact presented and decided in the former action* and would not have conceded that other questions might be litigated in an advense suit. *As before indicated,* it is not shown in the present case *whether there was an adverse suit,* nor if so, *what questions* were in fact *presented* and determined therein nor upon what ground the *superior right in the area* in conflict was asserted and *sustained in the patent proceedings.* The *claim of estoppel was interposed by the defendants,* and the burden was upon them *to show* the existence of every fact essential to sustain it."

All this will be remembered in connection with the opening sentence of our citation: "It is not shown, so it cannot be said, and it is not insisted *that there was* any actual issue, trial or decision * * * in the proceedings for patent." The great point in this decision is that Mr. Justice Van De Venter points out that

the rules applying to court actions in matters of *res adjudicata is equally applicable to land office patent* proceedings and thus make all our citations applicable.

In the Supreme Court, 207 U. S. 1, the judgment was affirmed where it was held:

> "(6) *Priority of right* to a single broad vein in the discoverer is not determined by the dates of the entries *or patents* of the respective claims, and priority of discovery may be shown by testimony *other than the entries and patents.*"

And this court said, (p. 17):

> "Generally speaking, if the boundary between two claims is undisputed, the foundation for an adverse suit is lacking. While a patent is evidence of the patentee's priority of right to the ground described, *it is not evidence* that the right was initiated prior to the right of the patentee of adjoining ground within his claim."

We submit that natural reasoning, coupled with the foregoing decision and its citations, will establish the fact that no presumption may flow where there is no record adjudication. That the court may not say that we are estopped from saying there was no adjudication when in fact there was none and this court may not assume from the mere patent issuance, independent of its contents and lack of recitals, that there was an adjudication of all the

material facts upon which the patent must be based to be regular, when it is admitted by the demurrer and record and from the face of the patent that there are no adjudicative facts behind the record. And it is the real fact, too. *We consent now,* counsel may insert in their brief the record, examination, adjudication and determination on which the patent is based; that they bind it with (if they can find it) the Congressional Record and land office "determination" record and submit it to the court as a whole, and then a most fallacious defense, the sole defense of the mightiest grab of the public lands in the history of the republic will have gone down to defeat. Will counsel meet the fact? *No.*

Mr. Justice Van De Venter had another opportunity in *Leonard v. Lennox,* 181 *F.* 760, to pass on the question of the conclusiveness of a patent *concerning facts* and conditions *not actually* determined *in the land office patent proceeding.* In that case a patent for coal land had issued to A., and B. sought to impeach the claims of the patentee. The proof in the land office covered all requirements except as to the *non-saline* character of the land, and B. contended that for such reason the patent was *not conclusive,* and A. in reply contended that such proof was unnecessary, as the surveyor's return showed the land was not saline, and the court said, page 768:

"* * * It is next urged that in this instance compliance with the regulation (of the land department) was not necessary because the land, when surveyed, was noted upon the surveyor's *return as being agricultural in character and not saline.*

"Passing the fact that the surveyor's return, which was made fourteen years before the application, would afford no information in respect to determining discoveries, we think the contention is foreclosed by the decision in *Barden v. N. P. R. R. Co.,* 154 *U. S.* 288, where it was said: 'Some weight is sought to be given by counsel of the plaintiff to the allegation that the lands in controversy are included in the section which was surveyed in 1868 and a plat thereof *filed by the surveyor in the land office of that year, from which it is asserted that the character of the land was ascertained and determined and reported to be agricultural and not mineral.* But the conclusive answer to such alleged determination and report is, that the matters to which they relate *were not left to the surveyor-general.* Neither he nor any of his subordinates were authorized to *determine* finally the character of any lands granted or make *any binding* report thereon. Information of the character of all lands surveyed is required of surveying officers, so far as knowledge respecting them is obtained in the course of their duties; *but* they are not clothed with authority to especially examine as to these matters outside of their other duties or to determine them; *nor does* their report have any binding force. It is simply an addition made to the general information obtained from different sources on this subject.'"

And continuing, Mr. Justice Van De Venter (p. 768) said:

> *"Of the contention* that the local land officers waived compliance with the regulation by not insisting thereon it is enough to observe: First, * * * and, second, that had they been charged with the duty of passing on such applications, they could not have waived compliance with the regulation *because it had the force of law and was no less binding on them than on the applicants."*

We will show elsewhere in this brief that the railroad company *failed to comply* with the law and the regulations of the land department concerning proof of the non-mineral character of the lands in controversy, and that the rules of the land department in such instance were absolutely violated and disregarded. Counsel will not, in their answering brief, bring to the attention of this court the "record and facts decided and judgment rendered in the land office" for the very simple reason *there was no record, no facts were decided and no judgment rendered,* simply patent issuing on the railroad's application and received and accepted with full knowledge of the then agreed facts. Surely the law and the fact may not be tricked this way. If so, the law is but a puerile force in the establishment of the truth and becomes the ally of wrong and fallacy.

This rule of conclusiveness of *actually* investigated and actually decided facts and *an actual* decision on such facts is evidenced by the text of *Herman on Estoppel and Res Adjudicata* at section 441 (Vol. 1), and the controlling case of *Hosmer v. Wallace*, 47 *Cal.* 461, and others cited in the text. It is the same rule that attaches to the rulings and decisions of the secretary of the treasury, the comptroller of the currency, commissioner of pensions, etc., *which are conclusive* where all parties in interest have had notice, where there has been a jurisdictional hearing and *an actual determination of facts* and the actual rendition of a judgment thereon and the distinguishing reason of "actual decision" "of facts actually decided" run through all the decisions. (23 Cyc., p. 1223, etc.) And so this part of the suit resolves into the question, namely: Assuming the patent, discarding for the moment the question of the mineral exception, issued without any examination or decision, is attack on same limited to the United States in a direct suit? It seems to us that in such an instance the patent is simply the "legal conclusion" that without a record or an adjudicated statutory, jurisdictional fact, the land offices claimed the right, without law and in violation of law, to issue a patent for lands, worth in excess of a half a billion of dollars. Our view is supported by the

many cases we have cited and the additional authorities to be found in *Cyc., Vol.* 32, *pp.* 1021, *etc.*

A. *The decisions of the land department,* in order to be conclusive, *must be made* according to the regular rules of practice of the department *and must be based on legal evidence* or on some *formal* inquest in which there is an actual finding of fact.

Puget Mill Co. v. Brown, 54 *F.* 987.

And in *U. S. v. Coos Bay Wagonroad Co.,* 89 *F.* 151, it was held by Judge Bellinger whether lands *are within the limits or subject to the operation of a grant for* public improvements *is not a question of fact* within the rule that the judgment of the land department is final on questions of fact.

B. A decision of the land department is conclusive as to the character of the land *when that fact is actually determined.*

Wharton on Evidence, Sec. 822;
Potter v. Randolph, 126 *Cal.* 461-2;
Cragie v. Roberts, 6 *Cal. App.* 309-12, *etc.;*
U. S. v. Mackintosh, 85 *F.* 333.

C. The court will remember the application of the defendant railroad for a patent and the "proceeding" in which it issued, was purely *ex parte—there was no publication,* hearing, etc., and the rules and regulations

of the land department *were not even followed* in any particular. The patent application was made in May, 1892. The rules and regulations of the land department existing at that time provided (briefly) that there should be "posting and publication" and that a satisfactory showing as to the character of the land must be made. Nothing of this character was pursued in our instance, and for the very simple reason *there was no pretense made at the time that the land department was intending to pass on the character of the land.* Ordinarily and at that time most convincing proof was required of the agricultural character of the ground was required before the department would *actually* pass on the question and actually determine the fact. Railroad land grant companies were required to prove that *each quarter section* had been properly examined, and to furnish proper proof that each 160 *acres were free from mineral* and previous to the issuance of this patent the rule had been changed so that specific proof was required that each 40 acres was not mineral.

We are claiming under a general grant of mineral lands to citizens of the United States: the defendant railroad company is claiming under a limited subsequent grant and the land department refused or neglected to designate the quality of the land and *in violation of law and of its own rules* issued a patent bearing on its face a statement of non-determination and

yet it is contended by the patentee that the patent is false and (presumably) there must have been a determination when by its demurrer (and the fact) the defendant railroad company admits there was no determination. Thus the patentee is collaterally attacking its own patent—repudiates the same and falls back on the "issuance" as the source of all its right and title. In other words, a judgment may be an absolute nullity but the mere *clerical* entry of the judgment has a saving grace.

An isolated citation from *Davis v. Weibbold*, 139 *U. S.* 524, will not establish the proposition that the patent is of itself conclusive, that the patentee is entitled to it, on the merits or under the law that he seeks it under. The whole case should be carefully read in light of the ever present fact that the court was there considering and always referring to a *perfect patent founded on a perfect record* under a grant that *only* precluded "known" mineral lands, and at pages 523-4 (and it will be remembered that later and in the *Barden case*, 154 *U. S.* 288, Mr. Justice Fields fully explained and differentiated that case *as not applying* and as not to be used in *railroad land grant cases*), the court said:

> "* * * It is not denied that said section was returned as agricultural by the United States surveyor (not so here); that it was regularly patented to said company without fraud or mistake * * * so

far as shown by the record. The issuance of said patent was a determination by the proper tribunal that the lands covered by the patent * * * were not mineral at the date of the issuance of said patent."

But in the same case this court stated that the patent was conclusive when containing proper recitals showing a compliance with the law.

And an examination of the record shows a *perfect* record, proofs, actual finding of fact and actual decision.

In the *Barden* case Mr. Justice Fields admits that he spoke inadvertently in the *Davis-Wiebbold case* on this particular question, and both the *Deffebach-Hawke* and *Weibbold-Davis* cases need the interpretation of the *Barden* case, for in the two former but scant reference is made to the functions of a patent while the later the patent issuing under grants that precluded only *"known"* mineral land and its effect and how it should be issued are discussed at length.

In the *Weibbold-Davis case* (p. 526) the court said:

> " * * * *If the mining patent states any initiating steps in* acquiring title which antedates the title of the townsite that may *suffice in any action at law* * * * *but* in this action the patent *does not* show any initiating steps; it *merely refers* to the entry of the mining claim, and that was after

> the patent issued to the townsite. No *proof* was offered to show when the mining claim was *originally located* * * * the absence of any proceedings required by *law* to initiate a right to a mining claim, which he might perhaps have shown would have been very persuasive that no mine was known to exist."

It is clear from the text and the facts of the citation that there must be an antedecent record sufficient in its jurisdictional facts to uphold the duly recited patent. If issued in the absence of a record or without recital of jurisdictional facts the patent is of no moment, and in the *Deffebach-Hawke* and *Weibbold-Davis* cases the court *went behind* the patent to find a supporting record. In our case it will be conceded by us that certificates were returned by public officers to the effect the records of their respective offices showed no adverse claim of record and that the land had not been returned denominated as mineral (or other) land, but there was no *certificate* as in the *Howard-Perrin case*, 200 *U. S., p. 72, "that the land is non-mineral in character,"* a marked distinction, as one is the finding of a fact while the other is that the record books mention not the subject. Under section 891, *R. S.*, the certificates would have been competent but not necessarily material.

In *Doe v. Mahana*, 21 (*U. S.*) 276, it was held it was for the jury to say whether the secretary of the interior *had actually* decided to select *and had* selected certain land for the use of schools, the case showing the necessity of final and actual decision on the part of the secretary, and a ruling along the similar line of actuality will be found in *Hedrick v. Hughes*, 15 *Wall.* 123, and *Johanson v. Washington*, 190 *U. S.* 179, all cases of collateral attack.

There is certainly no greater sanctity surrounding the land department than surrounds the circuit courts of the United States, and it cannot be maintained that a non-adjudicated fact will be presumed to have been adjudicated *simply because judgment enters.*

The rule as pointed out by Mr. Justice Van De Venter *(supra)* is analogous, namely, what is adjudicated is conclusive; non-adjudicated questions create no bar to subsequent attack. In other words, the *"decisions"* of the land department are final to the same extent that those of other judicial or *quasi* judicial tribunals are, *what has been adjudicated* as a fact is binding. Whether or not the land was mineral *was a question depending on parol testimony.* (*Johnson v. Drew*, 171 *U. S.* 99). How could the fact be established except by testimony? None was offered and no finding was made, and it is just in the condition of *Burfenning*

case, 163 *U. S.* 321, where the court said the question of mineral character of the land *did not rest on the record, but was dependent on oral testimony*, and after such testimony the finding of the department one way or the other on that question would be conclusive, and it necessarily follows that the converse of the proposition would be true.

United States v. C. M. & St. P. R. 218 *U. S.* 242-3.

The case shows that an *"actual decision"* is contemplated; not a mere issuance of a piece of paper analogous to a writ of assistance, which writ, *unless predicated* on an *actual* judgment, would be of no avail.

U. S. v. Rizzinelli, 182 *F.* 675;
Teller v. U. S., 113 *F.* 273;
Jeffords v. Hine, 15 *Morrison Min. Rep.* 579;
Baldwin v. Stark, 107 *U. S.* 463;
Lee v. Johnson, 116 *U. S.* 48;
Dargin v. Koch, 20 *L. D.* 384;
Shepley v. Cowan, 91 *U. S.*, *pp.* 339-340.

That the patent must state the finding or the record show it is pointed out in *Eureka Co. v. Richmond Co.*, 4 *Sawy*, (*C. C. D. N.*) 302, when Field, J., said:

> "If the date of such location *be stated in the patent, or appear* from the record in the local land office, the patent will take effect from that date. It is only

where an adverse party was required to *adverse* and fails that the theory of presumption of regularity arises, and when *no opportunity is presented to adverse the rule necessarily fails.*"

In the *Kemp case,* 104 *U. S.* 636, the court, discussing a perfect patent founded on a perfect record, where the officers, upon evidence, rendered a judgment and *not merely issued an execution without a judgment,* as in our case, and in the *Steele case,* 106 *U. S.* 447, there was admittedly a precedent *finding of facts* on which the patent was based and the ejectment suit was predicated on the proposition that the *testimony* on *which* the *specific* finding of fact was made, *was false* and the decision of the Supreme Court simply was that the validity of a patent could not in this manner be assailed collaterally in an action of ejectment any more than could a *judgment obtained by false testimony.* We admit it, but can a judgment of a court be held conclusive in a suit in equity when it is admitted that a fact in controversy was not passed on or adjudicated in an action in which the judgment issued?

Mr. Justice Fields expressly said in the Steele case *"that the patent is the result of the judgment,"* thus doing away with the repeated protestation of counsel that "the patent is the decision" or "the patent is the judg-

ment." A judgment issued in a suit absolutely without any testimony would not be conclusive except to this extent, namely, that while the judgment would not be void it would not constitute an estoppel as to facts not appearing by way of recital in the judgment, but even this rule would not apply to us as there was no judgment rendered in the land office *and the patent is neither a decision nor a judgment. A patent is simply a quitclaim deed* and it is everywhere the rule that a quitclaim deed puts a man on his inquiry (85 Cal. 458-9) and it is conclusive only to the extent that it conforms to the judgment *of which it is the result* and that authorized its issuance, and if the ruling of the commissioner of the general land office directing that the *excepted* patent issue was made on the unproven allegations of the defendant railroad company, with the mineral exception in it, then a question of law was passed on and *not a question of fact.* And such a ruling is subject to review.

A patent is nothing more than a deed (43 Iowa 11; 188 U. S. 432; 10 F. 785; 132 U. S. 239; 136 Pa. St. 541-552; 70 U. S. 478).

In the much cited (by counsel) case of *U. S. v. Winona, 67 F.,* at pp. 955-6, we find the court saying:

> "When a claim under a grant for a railroad company is made to a portion of the public lands under its control

the tribunal must *determine* whether or not it has complied, etc., etc. In every case there must, in the nature of things, *be a decision of questions of fact and questions of law,* because in every case the ultimate question is * * * A patent is the *record evidence* of *the judgment of the tribunal.*"

This court, however, said that the patent is the result of the judgment and not the judgment as some inferior courts have stated.

But this observation was made in an instance where there was a record and decision and a patent with full recitals. Let us illustrate: A. commences an action against B. to quiet title: there is no contest, hearing, evidence, findings of fact or judgment, but the clerk issues his deed to B. (as he has a right to do under certain circumstances). Will it be contended that the deed passed the title of A. to B. or that A. was bound by it?

It has never been held that a patent containing no recitals, and issued without findings of fact, was conclusive. All the cases hold there must be a decision, a right or wrong decision, based on findings of fact. In the *Winona case* the land had been certified for patent and the trial court held that the particular certificates found in that case *were evidence* that the grants to the railroad company had attached to the lands in controversy and that the certificate

was the equivalent of a patent and that a patent issued *within* the jurisdiction of the land department is an adjudication that the patentee *is entitled to land under* the laws of the United States and is a conveyance and not subject to attack collaterally. (Page 955.)

The case is better reported in 165 U. S. 463, where it appears (p. 464) *that on* proceedings in the land office, *after* proper *notice by publication, all prior entries were cancelled prior* to the certification, etc., and *on an agreed* state of facts that no adverse claims had ever been made according to the records, etc., and the railroad *afterwards* sold the land to innocent purchasers and that it was *not* contended that the lands altogether received by the railroad company *exceeded the grant!* And that it was not contended the railroad company received more lands that it was ENTITLED to receive, but that the lands in controversy were improperly certified. Then on page 465 the *government counsel practically stipulated away their entire case,* but even then the judgment of the court below was *only saved* by further stipulating away the effect of the *Dunmeyer case* (p. 473), and on that sole and express ground the Supreme Court said it would save the *innocent purchasers* by applying to the case a law by way of laches *not* then yet in force! For the court said:

> "If these two sections (the subject-matter of which was relied on in the court below and on which its ruling was based) were *all the legislation* of congress bearing on the subject *it might be difficult to sustain* the judgment of the lower courts *or to deny* the relief sought by the government, for, by the construction *placed* on railroad grants in *K. P. R. Co. v. Dunmeyer* (113 U. S. 629), *these lands did not pass under the railroad grants.*"

And the court saved the innocent purchasers by giving them the benefit of the Act of March 2d, 1896, *but the Supreme Court expressly repudiated* the holding of the court below *that the patents were conclusive or binding* on any of the grounds stated by the trial court in its opinion, and even despite the government's stipulations it held the patents were void, but that in view of the statute of limitations about to become effective the federal action could not be maintained, and we cannot understand why counsel cited the case decided in the lower court, or, having done so, they failed to point out that all the material holdings of that case had been destroyed by the Supreme Court.

It is true Judge Sanborn frequently referred to it in his subsequent decisions, and in *King v. McAndrews*, 111 *F.* 864, *supra*, he says the test of jurisdiction is the right to enter upon the inquiry *and to make some decision*, and the learned judge added:

> "Hence, a patent, evidencing an *erroneous decision of a question of law* or a mistaken determination of a question of fact, which the department was vested with power and charged with the duty to decide, is as impervious to collateral attack as one which is the result of correct conclusions."

Of course the patent issued by reason of the erroneous conclusion of law might be reached by direct attack, but it is equally plain that if it issued in violation of law as the result of an erroneous legal conclusion the patent would be void and subject to collateral attack even by a subsequent claimant. All the Sanborn decisions are differentiated in 173 *F. at page* 898, where the court said, on appeal, that a patent is like a sheriff's deed *after judgment* and execution (Stewart v. McHarry, 159 U. S. 643.) Suppose a sheriff should issue deed for the Southern Pacific Building in San Francisco to this appellant, a deed without a judgment or record or recitals? Would it be conclusive?

Judge Sanborn at *page* 863 *(King v. McAndrews, 111 F.)* says that his decisions in *U. S. v. N. P. R. R. Co., 95 F. 864-870, and in the Winona case, 67 F. 948,* were affirmed in the U. S. Supreme Court *without* any criticism of his views, and that thereby it may be safely assumed that his views received the approval of the Supreme Court. As we have point-

ed out the affirmance of *Winona case* was based entirely on a question that was not even suggested by or before Judge Sanborn, and the case thereby saved.

In the other case, as Judge Sanborn expressly said (p. 870), the question was, Did the department have jurisdiction to issue the patent and determine the questions *which conditioned* its issue and whether a patent was void because it was induced by error, fraud or mistake of fact," and when the case reached the United States Supreme Court it was affirmed on the ground *only* that the non-completion of the road within the time limited did not *ipso facto* forfeit the grant, but in neither of the cases was there one single sentence of which it may be said upheld the proposition of Judge Sanborn that the patent *is a judgment of the land department,* while the Winona case, if it held anything on the subject, *held it was not,* and nowhere did those cases hold that a ruling on a question of law was as binding as a finding on a question of fact, and in the *Colburn case,* 164 *U. S., pp.* 385-6, *this court said:*

> "A motion is made to dismiss for lack of a federal question. The contention is that the defendant disclosed in its answer a *decision of the land department* * * * ; that having pleaded this decision of the land department, that decision is final and conclusive *until* set aside in a direct pro-

ceeding instituted for that purpose. *This motion must be overruled.* The answer of the company alleged the congressional land grant, and the fact and circumstances which under that grant created, as claimed, a title to the land. It is true he also set up certain proceedings in the land department, but that was by way of answer to the allegations in the complaint of a *decision by that department* claimed by the plaintiff to be controlling, and *disclosed in detail the facts* upon which that *decision* was based and the terms *of the decision itself*, in order to show that such decision was *ineffective* to disturb the title which it took by virtue of the land grant and the proceedings had thereunder. * * * On the merits of the case it may be observed that the burden of the decision of the Supreme Court of the state is that because the land department *had decided adversely* to the claim of the railroad company and because no direct proceedings had been had to set aside that decision, it *was conclusive* against the company. In this we think the learned court *erred.* * * * *Now, in this case the allegations are that Kelly never made any entry in the local land office,* and the *decision* of the secretary of the interior is based simply on the fact of occupation and cultivation. And while the *decision* of that fact may be conclusive between the parties, his ruling that such occupation and cultivation created a claim *exempting the land from the operation of the land grant,* is a decision on a matter of law which *does not* conclude the parties and which is open to review in the courts. In this connection it may be borne in mind that the act of congress operated to pass the fee, and this independently of the issue of a

patent, * * * so that the case presented is of a *mere* decision of the secretary of the interior that the plaintiff was entitled to a patent and not that a patent already issued. *Though* a patent had been issued, *it would not follow* that it is conclusive, even in an *action at law*, and that in all cases *some direct* proceeding to set aside the patent is necessary. * * * For the reasons above indicated, because the decision of the land department was *only* on matters of fact and did not conclude the law of the case, *and because* such facts *so found were not of themselves sufficient* to disturb the title of the railroad company, the judgment is reversed, etc."

And in *Hawley v. Diller*, 178 U. S. 489-90, the same rule was expressed.

In view of these decisions we are, we think, justified in claiming that the oft relied, oft repeated proposition of Judge Sanborn that errors of law or rulings of law based on *insufficient* facts could only be reversed in a direct attack, and that the patent is the decision, adjudication and judgment of the land office is erroneous. As a matter of fact this suit, taken as a whole is a direct attack, except in the instance of the allegations relating to the mineral exception and this appellant being in privity with the paramount title *can maintain all or any* actions that could be maintained by the United States under the true rule announced in *Mery v. Brodt*, 121 *Cal.* 335.

In answer to our argument under this point counsel in the courts below contended:

> "If through fraud or mistake the government issues to a railroad company a patent for land which was known to be mineral at the time the patent issued, only the government or those who were in privity with the government at the time such fraud was practiced or mistake committed can be heard to complain thereof"

and therewith cited the following cases, namely,

Smelting Co. v. Kemp, 104 *U. S.* 639;
Steel v. Smelting Co., 106 *U. S.* 447;
Hartman v. Warren, 75 *Fed.* 157;
Deweese v. Reinhard, 61 *Fed.* 777;
Carter v. Thompson, 65 *Fed.* 329;
Jameson v. James, 155 *Cal.* 275;
Peabody Gold Mining Co. v. Gold Hill Mining Co., 111 *Fed.* 817;
Bear v. Luce, *Fed. Case No.* 1179;
New Dunderberg Min. Co. v. Old, 79 *Fed.* 598;
Neilson v. Champagne Mining Co., 119 *Fed.* 123;
Oregon Trunk Line v. Deschutes R. Co., 172 *Fed.* 738;
Lee v. Johnson, 116 *U. S.* 48, 53;
Sparks v. Pierce, 115 *U. S.* 408;
Meader v. Norton, 11 *Wall.* 442, 458;
Johnson v. Towsley, 13 *Wall.* 72;
Silver v. Ladd, 7 *Wall.* 219, 228;

Warren v. Van Brunt, 19 *Wall.* 646;
Moore v. Robbins, 6 *Otte* 530, 539;
Shepley v. Cowan, 1 *Otte* 336-340;
Marquez v. Frisbie, 101 *U. S.* 473-479;
Bohall v. Dilla, 114 *U. S.* 47-51;
Maxwell Land Grant Case, 121 *U. S.* 380-381;
Knight v. U. S. Land Asso., 142 *U. S.* 161-216;
Monroe Cattle Co. v. Becker, 147 *U. S.* 47-59;
In re Emblen, 161 *U. S.* 52-57;
Duluth, etc. v. Roy, 173 *U. S.* 587;
Emblen v. Lincoln Land Co., 184 *U. S.* 660-664;
Manning v. San Jacinto Tin Co., 9 *Fed.* 727-735;
Scott v. Lockey Investment Co., 60 *Fed.* 34-37;
Campbell v. Weyerhaeuser, 161 *Fed.* 332-334;
Am. & Eng. Ency. of Law, (2d Ed.) *Vol.* 26, *p.* 401.

The answer is simply, that each of the cases were instances of a voidable patent *issued within* the *jurisdiction* of the land department. There is not within the lengthy list an instance of *a void patent;* there could be no instance of a void patent as in such instance the ac-

tion provided for in cases of fraud, imposition and mistake would not be and such action could only lie in instances of *voidable patents issued within the jurisdiction of the land department*, and all the patents were issued on a jurisdictional record.

In cases of void patents the same may be impeached in any form of action where they are offered as the base of the attack or defense.

Williams v. San Pedro, 153 *Cal.* 44.

> "On the other hand a patent may be collaterally impeached *in any action* and its operation as a conveyance defeated, by showing that the department had no jurisdiction to dispose of the lands, etc."
>
> *Kemp v. Smelting Co.*, 104 *U. S.* 636.

And again this court in *Steele v. Smelting Co.*, 106 *U. S.* 447,

> "if the lands purported to have been conveyed by patent were the property of the United * * * or reserved from sale, the patent would be *inoperative* to pass the title and objection could be taken to it *at any time and in any form of action.*"

In connection with these points and cases the court will remember that at the time of patent it was not within the power of the United States to convey the land; that the United States was holding the paramount title to the controverted land in trust for the min-

ing locators who had taken up the land under the mining laws of the United States previous to the railroad applications for patent and that such outstanding title remained in the locators down to the moment of forfeiture and relocation.

It was a favorite argument with counsel in the courts below that the patent having issued all antecedent adverse claims which might have prevented the issuance of the patent will be presumed not to have existed.

That the patent having issued this court will presume that there was no Coalinga mining district, that no valid antecedent mining locations had been made or having been made they had been abandoned, etc., etc.

Elsewhere and in the same connection they contended that certification of the selected lists for patent was a conclusive adjudication that carried all of the foregoing presumptions and at all times they contended that the act of certification was the legal equivalent of the issuance of patent.

The exact question arose in Bridgman v. Weeks, 159 *U. S.* 541, and therein was decided adversely to the now claims of the defendant railroad company.

In that case there had been a certification pursuant to the act of congress of March 3, 1857, granting certain lands to the territory of Minnesota for the construction of

railroads in alternate sections not otherwise appropriated or to which rights of pre-emption had not attached, etc.

Prior to the filing of the map of the definite location by the railroad company a pre-emption application was made to the local land office but rejected and later the lands were certified and subsequently the title passed to the railroad company from the territory of Minnesota under the certification of the general land office. Later a patent issued to the pre-emptor in the usual form except that it was stated therein that the land had been certified to the state of Minnesota for railroad purposes by mistake and the successor of the pre-emptor instituted his action of ejectment against the grantee of the railroad company and ultimately the case reached this court where it was strenuously contended that the secretary of the interior had included the section in controversy in the list of lands certified to the state of Minnesota as part of the lands granted by the act of March 3, 1857, and that such certification was an adjudication that the land in question had not been precisely disposed of and that no pre-emption right had attached thereto and passed the legal title to the lands notwithstanding whatever the pre-emptor's equitable right might be; and *that while certification might be voidable it was not void.*

And the contention did not prevail; this court tersely stating that the certification was void and did not carry the presumptions contended for by the grantee of the railroad company that no antecedent pre-emption right had attached to the land.

Mr. Justice Van De Venter, then assistant attorney general of the United States, had occasion to construe the ruling of this court in that decision and suggested that the land department had the right to ignore patents illegally issued and to proceed on the theory that none had been issued, and, if this be so it naturally appears that the patent in controversy being absolutely void, the title to lands in controversy remaining in the United States; that the same are within the jurisdiction of the land department and it has never been apparent to the writer of this brief that the land department could lose its jurisdiction over the lands in controversy if the legal title to the same remained in the United States under the mineral exception and we suggest that there is no authority for the proposition that the land department does not retain jurisdiction over public lands in cases where patents have been illegally issued, that is in instances where the land department had not the jurisdiction to issue a controverted patent.

In many instances the land department have issued one, two or more

patents for the same piece of land and in many of those instances it was held that the second or even the third patent prevailed in actions at law and in equity and against the antecedent title and it naturally follows that in an action at law where the plaintiff was the owner of the second patent that he could not prevail except by showing a legal title and if the courts in those cases held that the second patent was a legal title it naturally follows that the land department had jurisdiction over the land sufficient to pass a legal title notwithstanding it had prior thereto apparently lost all jurisdiction over the lands on the issuance of the first patent.

LeRoy v. Jameson, 3 *Swing*, 369.

Counsel for the defendants tried to bolster their contention in that the patent created the presumption *that no prior mining claims existed* by citing and relying on (and misinterpreting) the following cases (1) *Scott v. Lockey*, 60 *F.* 34; (2) *Carter v. Thompson*, 65 *F.* 329; *Buena Vista, etc. v. Tulare, etc.*, 67 *F.* 226; (3) *U. S. v. Winona etc.*, 67 *Fed.* 948-975, generally, and (4) specially, *Lange v. Robinson*, 148 *F.* 803, that a valid subsisting mining claim was not sufficient to take land out of the catagory of agricultural land and stamp it as mineral land.

Taking up the *Winona* case first, we find that counsel contended that the

holding of the case was that a certification (equivalent to a patent) established the conclusive contention that there were no homestead or pre-emption claims on the land at the time of definite location. Conceding that Judge Sanborn held so at circuit the fact remains that such a holding was explicitly disapproved in *Bridgeman v. Weeks* (*supra*) and the further fact remains that when the case reached this court it was explicitly stated (165 U. S. 463) that on proceedings in the land office, after proper notice by publication, *all prior* entries were cancelled *prior* to certification and even then this court could only save the case by applying to it the federal statute of limitations of March 2, 1896, and this court at page 473 said:

> "If these two sections were all the legislation of congress having on the subject it might be difficult to sustain the judgment of the lower courts or to deny the relief sought by the government, for, by the construction placed on railroad grants in *R. R. Co. v. Dunmeyer*, 113 *U. S.* 629, lands did not pass under the railroad grants, etc."

and similar ruling, as stated in Bridgeman v. Weeks (*supra*) were made by this court in

Hastings etc. v. Whitney, 132 *U. S.* 357;
Bardon v. N. P. R. R. Co., 145 *U. S.* 535;
Art v. Brandon, 156 *U. S.* 537;
Whitney v. Taylor, 158 *U. S.* 85.

Counsel was unable to cite a single decision of this court where it was held that *certification or patent* would create, of itself, the conclusive presumption that no prior claims of pre-emption or homestead or mining locations existed or that this court would presume, in presence of the undisputed facts, by mere certification or patent that the lands were "not reserved, sold, granted or otherwise appropriated, and free from pre-emption *or other claims* or rights."

Counsel contended, apparently, that "not reserved" referred to special reservations such as designated military or Indian reservations. In other words, counsel contended that while the land department was without jurisdiction to patent a few acres embraced in some lighthouse reservation, it had a perfect right to patent 200,000 acres of *known* mineral lands of enormous value because the particular acres covered by valid subsisting recorded mining locations had not, prior thereto, been specially reserved in some particular act of congress; that while congress had said *all mineral lands* were reserved they were not reserved because congress had not said that the N. W. ¼ of the S. E. ¼ of some section being mineral land could not pass under a railroad grant, and to uphold this remarkable proposition they cited the uncited case of *Scott v. Lockey*, 60

F. 34, which, while greatly relied on and much exploited by counsel, is absolutely in our favor as a converse proposition.

In *Doolan v. Carr*, 125 *U. S.* 618-642, the United States had issued a patent under a railroad land grant and *subsequently* the defendant made an entry on the land and in an action of ejectment brought against him by the grantee of the patentee this court held that the patent was not conclusive in any form of action and created no presumption of regularity in its issuance, etc.

At page 627 this court said (*citing Wilcox v. Jackson*, 38 *U. S.* 509):

> "In the opinion of the Supreme Court on this subject the language used in *Elliot v. Peirsol*, 26 *U. S.* 340, is quoted with approval:
>
> "Where a court has jurisdiction it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment until reversed is regarded as binding in every court. But if it acts without authority its judgments and orders are nullities. They are not voidable, *but simply void.*"
>
> "The court then proceeds: 'Now to apply this: Even assuming that the decision of the register and receiver, in the absence of frauds, would be conclusive as to the facts of the applicant then being in possession, and his cultivation during the preceding year because these questions are directly submitted to them; yet if

> they undertake to grant pre-emptions in lands in which the *law* declares that they shall not be granted, then they are acting upon a subject matter clearly not within their jurisdiction, as much so as if a court whose jurisdiction was declared not to extend beyond a given sum should attempt to take cognizance of a case beyond that sum.'"

and this court then cited the mining case of *Reynolds v. Iron Silver Mining Co.*, 116 *U. S.* 687, showing that lodes in placer claims were reserved from patent under the placer mining law, which is a case of a *general and not a special reservation*, and then passing to the question of general reservations as distinguished from special reservations, this court at *pp.* 630-31 said:

> "This court held (in a railroad land grant case) that, notwithstanding the generality of the granting clause, it was not intended by that statute to grant anything but *public* lands of the United States. * * * 'A *special exception of this land was not necessary* in these grants because the policy which dictated them confined them to land which congress could rightfully bestow, without disturbing existing relations and producing vexatious conflicts. *The legislation which reserved them for any purpose excluded it from disposal* as the public lands are usually disposed.'"

And at page 632 this court said:

> "It will be seen that this is the precise question presented in the case under consideration and (this) court,

> referring to the preceding case of Leavensworth, etc. v. U. S. (92 U. S. 733) and reciting the fact that in that case they confined a grant of every alternate section of "land" to such whereto the *complete title was absolutely vested in the United States,"*

and it must be apparent to this court that the "general reservation of mineral lands, known and unknown," has been sufficient to prevent mineral lands from passing under the various railroad land and school land grants. This court held in Doolan v. Carr that Mexican grants were "claims" or "rights" that could not pass under a railroad grant even if *patented* to the railroad grantee and though they were often indefinite in character. The dissenting opinion of Mr. Chief Justice Waite in *Doolan v. Carr* presents exactly the same argument *mutalis mutandis* as was advanced by counsel in the courts below, namely, that it mattered not whether the patent was voidable or unvoidable only an *antecedent* title could attack it and that view was set aside by this court in *Doolan v. Carr*, but counsel kept on reiterating it.

Counsel also attempted to thrust us into the catagory of cases akin to *Moffat v. U. S.* 112 *U. S.* 24, and *U. S. v. Minor*, 114 *U. S.* 241, "where it was said by this court, in the *Minor* case:

"When the patent is the result of nothing but fraud and perjury, it is enough to hold *that it conveys the legal title.*"

We make no charge of fraud or perjury except in so far as the Madden application is concerned nor are we attacking *any judgment* secured through fraud and perjury. The fraud spoken of or the perjury that might have occurred in a proceeding in the land office on the railroad application for patent would have been a legal justification for the issuance of a patent that would have carried the legal title, that could only be cancelled in a direct suit by the United States and if there had been fraud and perjury that resulted in a decision that the land was non-mineral and if the patent or certification for patent had issued as the result thereof *we would not be here contesting* with the railroad company as we would have no legal ground to stand on, because no patent is *void* that issues through fraud or perjury or imposition or mistake. In such instances a patent is only voidable but such question is not here.

The Madden application is not under consideration here as no question particularly affecting it has been certified to this court. The allegation in the bill concerning the Madden application and its falsity particularly referred to the questions whether the controverted

lands were coterminous to a completed twenty-five mile section of railroad.

No special demurrer or motion to strike was presented at circuit and that questions were not certified to this court and will not be argued here except in the incidental proposition that it being admitted by the demurrer and by the record that the lands not being coterminous to a completed twenty-five mile section, the land department violated its rules and the law in issuing the patent in controversy on the *ex parte* application of the defendant railroad company.

The Madden application on its face was not sufficient to vest the land department with jurisdiction. Mr. Madden simply said the lands applied for were not "*interdicted* ~~dicted~~ *mineral lands.*" He made no statement that the lands were not mineral lands, but simply stated they were not "interdicted" mineral lands; he did not allege that the lands sought to be patented were opposite a completed section of twenty-five miles and he sought the patent because, as he alleged *forty* miles of road had been completed—that is a full section of twenty-five miles plus a stub of fifteen miles, and our contention was that for the uncompleted section of fifteen miles the railroad company could not receive a patent for land coterminous, that is the defendant railroad company was not entitled under the grant to lands until a full section of twenty-five miles of road had

been completed, and in this instance the lands in controversy were coterminous not with a completed section but with a stub of *fifteen* miles which fact is set forth in the Madden application and for which reason it was so pleaded. It will be noted the land department made *no finding* as to the Madden statement of construction or quality of the land as the patent simply recites the construction of *two hundred and fifty-two miles* on nine 25-mile sections plus 2 miles.

The third question certified to this court reads:

"IS THE RESERVATION AND EXCEPTION CONTAINED IN THE GRANT IN THE PATENT TO THE SOUTHERN PACIFIC RAILROAD COMPANY VOID AND OF NO EFFECT?

The first provision in the grant excludes "all mineral lands." The grant (Act of July 26, 1866, Sec. 3) reads: "That all mineral lands be, and the same are, hereby excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated *agricultural* lands in odd numbered sections nearest to the line of said road, and within twenty miles thereof, may be selected as above provided."

The other provision is: "That the word 'mineral' when it occurs in this act shall not be held to include iron or coal."

The same intent and purpose is carried in the joint resolution of *June* 28, 1870.

The effect of the first of these provisions is to entirely exclude mineral lands from those which may be granted under the act, and to make their grant in aid of railroad construction *ultra vires* and illegal.

A-2. The only effect of the other proviso is to define and restrict the otherwise broader meaning of the word "mineral" and so that when used in that act, it shall not include coal or iron, and so that lands containing coal or iron may be granted under that act and are not excluded therefrom as mineral lands. *In other words, coal and iron lands are not mineral lands within the purview of that act.* This is the sole and entire effect of that proviso.

Now, in a suit to quiet title because the lands were mineral lands, all that it is necessary to aver, in order to bring the patent within this prohibition of the act, is that the lands were mineral lands; and it would be improper as well as necessary to aver that they were mineral lands other than for coal or iron, for coal and iron lands are not mineral lands within the provisos of that act.

It is important to observe that this act does not exclude certain or some mineral lands from those which may be

granted and permit the grant of other mineral lands. On the contrary, it plainly and emphatically prohibits the grant of any and every kind of mineral land, and then defines what are, or rather what are not mineral lands.

The distinction is as obvious as it is important. In the first case, if some mineral lands were excluded and others were not, then the averment in the bill that they were mineral lands would not necessarily mean that they were of the kind precluded from the grant. But when all mineral lands are excluded from the grant, and the act says that coal or iron lands are not to be considered as mineral lands, then the averment that the lands in question were mineral lands is unnecessarily an averment that they were within the prohibition of the act. There is, absolutely, no escape from this. When the act says that mineral lands shall not be granted and that coal or iron lands are not mineral lands, then the averment that they were mineral lands within the meaning of the act which is considered. And to go further and say that they were not something else which the law says are not mineral lands would be as improper as unnecessary.

This is conclusive of the question; but it far from being all that there is in this direction.

The manifest gravemen of the whole of this part of the bill is that the defendant illegally procured a patent for lands which were mineral lands within the preclusion of this act; and not at all that such patent was for lands which the act authorized. When a pleader avers as his cause of action that the defendant fraudulently or illegally procured a patent for mineral lands in violation of that act *and which there was no lawful power to grant,* it must, by every fair rule of construction, be taken to mean and intend such lands as were mineral lands under that act, and not lands which the statute said were not mineral; and when the act forbids the grant of any mineral lands in aid of railroad construction and the averment is the grant of mineral lands, this is necessarily sufficient.

A-3. That the exception of *known and unknown* mineral lands in the grant was legal needs no discussion. It has never been contended otherwise since the decision of this court in the *Barden* case and it is the settled law of this country.

The exception in the patent reads:

"YET EXCLUDING AND EXCEPTING 'ALL MINERAL LANDS' SHOULD ANY BE FOUND IN THE TRACTS AFORESAID, BUT THIS EXCLUSION AND EXCEPTION ACCORDING TO THE TERMS OF THE STATUTE SHALL NOT BE CONSTRUED TO INCLUDE COAL AND IRON LANDS."

The certificate of the commissioner of the general land directing the issue of the patent in controversy reads:

"It is hereby recommended that the tracts described (in said list) covering 440,900,85 acres, be approved and carried into patent as the lands falling within the grant aforesaid to said Southern Pacific Railroad Company of California, *excluding, however, from the approval and from the transfer in the patent* —that may be issued *"All mineral lands" should any such be found* in the tracts aforesaid; but this exclusion, according to the terms of the statute, shall not be construed to include coal and iron." [Appendix, p. ——]

The certificate plainly shows that the land department *never* approved the list of selected lands, never determined the quality of the land and never rendered any decision concerning the quality of the land, but *expressly* and pursuant to the granting acts, *ex-*

cluded from approval and *transfer* any *lands found to be mineral.* That was the only "judgment, determination or decision" ever made by the land department concerning the land in controversy.

The list was simply passed up to the commissioner of the general land office with certificates of his subordinates that the records of the land office showed no mineral claims existing in the land department concerning the selected list of nearly half of a million of acres. It was a purely formal act following the construction of the granting act that an excepted patent of unexamined and undetermined lands might issue carrying the mineral exception.

It was not compulsory for the grantee to accept the patent but the grantee did accept it, did record it and stood by silent under its provisions, terms and conditions for upwards of twenty-five years.

The entire "record" from the application of the Southern Pacific Railroad Company down to the issuance of the patent will be found in the appendix, marked Exhibit E. A-4. Examination of the record will disclose there was *absolutely* no examination concerning or any decision deciding the quality of the land; the various officers of the local and general land offices simply certifying that the books of their respective land officers

showed no mineral or swamp claim attaching to the lands described in the lists.

It is apparent from both the certificate directing the issue of the patent and from the face of the patent that the patent issued without examination of or decision concerning the quality of the land. Many years ago the Supreme Court of the state of California had occasion to call attention to the fact that the insertion of the mineral exception in a patent was notice to a railroad patentee that there had not been the examination required by law and in that case (*Gale v. Best*, 78 *Cal.* 240-1) the court said:

> "AND IT MIGHT STRONGLY BE ARGUED THAT SUCH CASE (EXCEPTED PATENT) ALTHOUGH IT WAS THE DUTY OF THE LAND DEPARTMENT TO DETERMINE THE CHARACTER OF THE LAND BEFORE THE ISSUANCE OF THE PATENT, YET AS THE PATENT SHOWS UPON ITS FACE THAT SUCH DUTY WAS NOT PERFORMED, THE PATENTEE MUST BE HELD TO HAVE TAKEN IT KNOWING ITS UNCERTAIN AND UNSTABLE CHARACTER."

About the time Judge Ross decided adversely to us, at circuit, a similar suit, between other parties, was decided by Judge Bean in the Oregon circuit and he decided favorably to our contention. (*Eastern Oregon Land Co. v. W. R. L. & I. Co.*, 186 *Fed.* —) Judge Bean said:

"COMPLAINANT INSISTS, HOWEVER, THAT THE ISSUANCE OF PATENT BY THE GOVERNMENT OF THE UNITED STATES TO ITS PREDECESSOR IN INTEREST IS A CONCLUSIVE ADJUDICATION THAT THE LANDS DESCRIBED THEREIN ARE NON-MINERAL. THAT WOULD PROBABLY BE TRUE IF THE PATENT CONTAINED NO RESERVATION (BARDEN V. N. P. R. R., 154 U. S. 288) BUT IT CONTAINS A CLAUSE "EXCLUDING AND EXCEPTING ALL MINERAL LAND SHOULD ANY SUCH BE FOUND IN THE TRACTS AFORESAID." THIS MANIFESTS AN UNMISTAKABLE INTENTION ON PART OF THE GOVERNMENT NOT TO CONVEY MINERAL LANDS AND REPELS ANY INFERENCE THAT THE DEPARTMENT ADJUDICATED OR INTENDED TO ADJUDICATE THAT NO PART OF THE LAND DESCRIBED IN THE PATENT WAS MINERAL."

Judge Ross had an opportunity to neutralize, if he could, the opinion of Judge Bean, as it was brought to his attention but he did not even refer to it in his opinion. This view of Judge Bean and of Judge McFarland in the Gale-Best case is intensified by comparing with the exception in the patent the certificate of the land office under which the excepted patent issued.

For forty years it had been the practice and the custom of the land department to insert the mineral exception in patents and as early as 1874 patents issuing under the Act of July 27, 1866, were returned by Sec-

retary of the Interior Noble with directions to insert the mineral exceptions.

Atlantic and Pacific R. R. Co., 12 *L. D.* 116.

The opinion in that land office decision was written by John W. Noble, a very great lawyer, and whose opinion concerning the *Weibbold-Davis* and *Deffebach-Hawke* cases was followed to the letter by this court in the *Barden case.*

At an early day the California courts began to pass on the question and there has never been any difference of opinion in the state court concerning the validity of such a mineral exception.

The discussion first arose in *Alford v. Barnum*, 45 *Cal.* 482.

The land was within the grant to the C. P. R. R. Co., and the company had received a patent for it, which patent "*excepted from its operation all mineral lands.*" The question at the trial turned on the question of the relative value of the property for mining or agricultural purposes, and the court and everyone concerned conceded the validity of the mineral exception.

Cited to same effect in *Merrill v. Dixon*, 15 *Nev.* 407; *Davis v. Weibbold*, 139 *U. S.* 519, discussing townsite

entries, and the court *recites the inclusion* of the mineral exceptions in the patent. On examination of *Davis v. Weibbold* it will be found that the court, applying the *Alford-Burnum* citation, refers to the mineral exception as being contained in the patent, and the confusion resulting from the *Deffebach-Hawke* and *Weibbold-Davis* cases is cleared away in *Barden v. N. P. R. R. Co.*, 154 *U. S.* 288, where the cases are distinguished *as not applying to grants* excluding *"unknown"* mineral lands, like railroad grants.

U. S. v. C. R. R. Co., 93 *F.* 873.

The particular value of this authority is that the case was litigated about the mineral exception; *that was* the base of the case and under the exception evidence of the mineral quality of the land was admitted, and the further importance of the authority is that under the mineral exception in that case a patent to the railroad company for known mineral lands was cancelled.

In *McLaughlin v. Powell*, 50 *Cal.* 64, it was held:

> "3. The question not decided whether plaintiff in ejectment, who relies on a patent to W. P. R. R. Co., must prove that the demanded premises are not mineral lands or are not within the exceptions contained in the grant.
>
> "4. If the plaintiff in ejectment relies on a patent to W. P. R. R.

Co. for land granted to aid in the construction of its railroad, which patent *excepts from the transfer all mineral lands,* the defendant may prove that the demanded premises are mineral lands.

"5. A patent to the W. P. R. R. Co. which excepts from the transfer "all mineral lands should any be found to exist in the tracts described," *does not convey* lands which were mineral.

"6. *The fact cannot be assumed that all the lands described in such patent are mineral lands, as the exception does not necessarily extend to all the tracts granted.*"

Approved in *Carr v. Quigley,* 57 *Cal.* 395, where the court said (*in banc at time when Judge Ross was on the California Supreme Court bench*): "The rehearing is denied. The decision comes within the rule laid down in *McLaughlin v. Powell,* 50 *Cal.* 64." Cited by Judge Ross in *McLaughlin v. Heid,* 63 *Cal.* 208, as not sustaining Carr v. Quigley, *supra,* but Judge Ross does not criticise the case, but in his own independent language says *that the exception was a part of the description,* and that by proving the mineral quality of the land the patent may be avoided. *Chi. Q. M. & M. Co.,* 75 *Cal.* 198, in approval of the rule, and the same in *U. Land Assn. v. Knight,* 85 *Cal.* 486. Distinguished in *Gale v. Best,* 78 *Cal.* 240-241, as a case in which the patent itself "*excepted all mineral lands should any be found to exist in the tracts embraced in the*

patents." Approved June 6, 1911, by California Supreme Court in *Van Ness v. Rooney*, 41 *Cal. Dec.* 695; 160 *Cal.* 131.

Taking up the case of *Chicago Quartz Mining Co. v. Oliver*, 75 *Cal.* 194, decided *en banc*, we find the similar rule:

> "A patent issued by the United States government to the C. P. R. R. Co. for land included within the boundaries of the grant made to it by act of congress of July 1, 1862, and the amendatory act of July 2, 1864, *is not conclusive* evidence that the land covered by the patent is *non-mineral* in character; *and a person claiming the land under a subsequent mining patent which issued in* 1883, as against a patent issued in 1870, in an action by him to quiet his title *against a grantee* of a railroad company, *may show the land is mineral, and upon such showing made is entitled to have his title quieted.*"

Approved June 6, 1911, by California Supreme Court in *Van Ness v. Rooney, supra.*

Cited to same effect in *Gale v. Best*, 78 *Cal.* 240, 12 Am. St. Rep. 48 (and note 49.)

In *Gale v. Best*, 78 *Cal.* 239 (*en banc*), it was held:

> "2. Our opinion is, that when a patent issues under a law which provides for its disposal as agricultural land, either to a railroad or to pre-emption or homestead claimants, and there is no reservation in the land except a general one of min-

> eral lands, *and no reservation at all in the patent,* then the patent must be considered as a conclusive determination by the government that the land is agricultural."

It will be noted the court uses the word "reservation" as the synonym of *"exception."*

On pages 240-241 of the *Gale-Best case* (the court having under consideration a patent *without* an exception, etc.) it was held that the decision did not conflict with the two preceding citations, for the reason *that they both contained the mineral exception,* and said:

> "AND IT MIGHT STRONGLY BE ARGUED THAT IN SUCH CASE, ALTHOUGH IT WAS THE DUTY OF THE LAND DEPARTMENT TO DETERMINE THE CHARACTER OF THE LAND BEFORE THE ISSUANCE OF THE PATENT, YET AS THE PATENT SHOWS UPON ITS FACE THAT SUCH DUTY WAS NOT PERFORMED, THE PATENTEE MUST BE HELD TO HAVE TAKEN IT KNOWING ITS UNCERTAIN AND UNSTABLE CHARACTER."

Such was our exact contention in the court below and such is *our exact contention* here.

And Judge Bean, in the case of *Eastern Oregon Land Co. v. The Willow River Land & Irrigation Co.,* 186 *F.* —— in an opinion filed November 10, 1910, with respect to such an exception, said:

"Complainant insists, however, that the issuance of patent by the government of the United States to its predecessor in interest is a conclusive adjudication that the lands described therein are non-mineral. That would probably be true if the patent contained no reservation (Barden v. N. P. R. R., 154 U. S. 288) but it contains a clause 'excluding and excepting all mineral lands should any such be found in the tract aforesaid.' This manifests an unmistakable intention on the part of the government not to convey mineral lands and repels any inference that the department adjudicated or intended to adjudicate that no part of the land described in the patent was mineral."

In the recent decision of the California Supreme Court in *Van Ness v. Rooney*, 160 *Cal.* 131, the cases of *McLaughlin v. Powell*, 50 Cal. 64, and *Chicago Quartz M. Co. v. Oliver*, 75 *Cal.* 194, were unreservedly approved, and the court again squarely held: (1) *The mineral exception in the patent was valid;* (2) that the federal statute of limitations of March 2nd, 1896, could not be invoked; (3) that a patent containing a mineral exception was not conclusive of the agricultural quality of the land and was subject to impeachment; (4) that the mineral exception was part of the description. Therefore it follows, we say, that the legal title to our mineral lands did not pass under the patent, and the title remaining in the United States, we had the right to make the subsequent mining re-

locations, and that such right is property that is entitled to the protection of the law, even against the United States.

In *Irvine v. Tarbat*, 105 Cal. 243, it is said, citing the *Kemp case*, 104 U. S. 636; *Green v. Hayes*, 70 Cal. 276; *Quinby v. Conlan*, 104 U. S. 420; *Gale v. Best, supra*, and other cases, that the rule of the *finality* of a patent is expressed in the *Kemp case*, as follows:

> "A patent duly signed, countersigned and sealed for public lands which at the time it was issued the land department had, under the statute, *authority to convey*, cannot collaterally be suspended in a *court of law;* and the *finding* of the department, *touching the existence of certain facts or the performance of certain antecedent acts*, upon which the lawful exercise of that authority may in that particular case depend, cannot in a *court of law* be questioned." And the court elsewhere said:
>
> "It follows from all the cases of which the foregoing are but a fraction, that plaintiff's patent, *which is not shown to contain any reservation*, was conclusive evidence that the land in question was open to pre-emption."

And the syllabus in *Standard Quicksilver Co. v. Habishaw*, 132 Cal. 115, which is an accurate digest of the case, says:

> "It is the peculiar province of the land department of the United States before issuing a patent to any land applied for, *to determine as a question of fact*, the character of the land, as to whether it is

> valuable for minerals within the meaning of that term, or agricultural ground; and its determination that the land is agricultural, *upon issuing a patent,* to a homestead settler, *without reservation of mineral lands, is conclusive as against a subsequent mining claimant of any part of the patented land not known to be valuable for minerals at the date of the patent.*"

In other words, the case squarely upholds the opinion of Judge Bean that the "exception in the patent" *repels any inference of adjudication and destroys the conclusiveness claimed by the defendants.*

Again, the California Supreme Court in the cases of *Saunders v. La Purisima,* etc., 125 Cal. 164-5, (citing the Burfenning case, 163 U. S. 321), and in the later case of *Standard, etc. v. Habishaw,* 132 Cal. 118, said: *In the absence of a mineral exception in the patent* it is conclusive of the agricultural quality of the land, which is in accordance with the opinion of Judge Bean. In fact, there is no decision to the contrary except the opinion of Judge Sawyer in the *Cowell v. Lammers* and *Francour v. Newhouse,* which were predicated on the insistent contention by Judge Sawyer that *unknown* mineral lands *passed* under the railroad grants and that as a sequence a mineral exception of unknown mineral land in a patent was void.

The patent issued is not conclusive of ownership. It shows on its face that it was issued contrary to law and before the land department had made the examination which the law required. It may be contended that the officials of the land department were the agents of the law to make the examination as to the mineral character of the land, and that they could not indefinitely defer such examination or shift the responsibility for making the same upon the courts or upon the grantee, or anyone else, as Judge Ross said, but it must also be conceded that the United States government could not part with its title to the land *except in strict compliance with the law.* That is to say, the officials of the land department could not issue a *valid patent* without first having made the examination which the law requires, and having determined what land within the grant was mineral and what was non-mineral. The proposition that public agents cannot bind the government by acts outside of and in violation of their authority, and beyond the statutes under which they act, is fundamental. The position of the defendants in this regard at least has the charm of novelty. They say that it being mandatory that there be a primary determination of the quality of the land, that this court, despite the demurrer and the record, must presume there was such primary determination and that, too, despite

the patent, their base of title which in its face conclusively shows there was *no such* determination.

The Supreme Court of the United States in *Moffat v. United States,* 112 *U. S.* 24, 28 *L. Ed.* 623, had before it a similar proposition, in such regard, and in that case the court said, speaking through Mr. Justice Field:

> "The position that, as the frauds charged were committed by officers of the United States, the court erred in not holding their acts to be binding, *and in not giving to the patents the force of valid conveyances,* is certainly a novel one. The government does not guarantee the integrity of its officers nor the validity of their acts. *It prescribes rules for them,* requires an oath for the faithful discharge of their duties, and exacts from them a bond with stringent conditions. It also provides penalties for their misconduct or fraud, but there its responsibility ends. *There would be a wild license to crime if their acts, in disregard of the law, were to be upheld to protect third parties as though performed in compliance with it.*"

The authority of the land department to issue patent is prescribed, limited, and qualified in the act of congress providing for the grant. The patent shows on its face that a condition precedent to the issuance of patent has not been complied with by the department. To uphold the patent in this case is to subscribe to a doctrine that any patent issued by the land department is conclusive and binding al-

though it was issued in direct violation of the law providing for its issuance, or in violation of the land office rules.

From the patent no one can tell what land was conveyed by the government. It excepts from the grant "all mineral lands, should any be found in the tract aforesaid." It shows that it was prematurely issued; that the examination which the law required had not been made. The cases cited by the demurring defendants on this proposition are not in point.

From an examination of these cases, as later shown in this brief, it appears that the record in those cases shows that the examinations which the law required had been made by the department, and any exception included in the patent thereafter would have been a limitation of the grant, as the question as to the mineral character of the land had been adjudicated before the issuance of the patent.

We submit, therefore, that the patent conveys no title from the government to mineral lands within the grant; whether it conveys title to any lands it is unnecessary to determine on this appeal.

Citations of counsel fall under the Barden decision. No court, except Judge Ross in this suit, ever approved the decisions of Judge Sawyer, and he did so only by implication as he did not refer in his opinion to the

decisions made by Judge Sawyer. By everyone, except counsel for the railroad company, it was granted that the opinions of Judge Sawyer, in face of the *Barden* case, were without force, but *Cowell-Lammers* is the only hope of the railroad company and they stand on the case today as the defendant railroad company did forty years ago in the California cases, making the same untimely contention that the exception is void because Judge Sawyer said so in *Cowell-Lammers* and *Francour v. Newhouse,* but discretly refraining from setting forth the basis of his decisions.

It was taken as granted by the courts and by all the executive departments of the government at the time of the *Barden* decision that it was the duty of the land department to insert the mineral exception in patents when the government had not had an opportunity to investigate and determine the quality of the land before the issuance of the patent and Mr. Justice Field in the *Barden* case in discussing how and when a patent should issue in an instance where there had been no opportunity for investigation and determination said (*Barden case,* 154 *U. S. at p.* 330):

> "The delay of the government in issuing patent to the plaintiff, of which great complaint is made, does not affect the power of the company to assert in the meantime by possessory action (*as held in Deseret Salt Co. v. Tarpey,* 142 *U. S.* 241)

its rights to lands which are *in fact non-mineral* but such delay as we will observe cannot have the effect of entitling it to receive, as, is contended in this case, lands which it admits to be mineral. The government cannot be reasonably expected to issue its patent, *and is not authorized to do so, without excepting mineral lands* until it has had the opportunity to have the country or that part of it for which patent is sought, sufficiently explored to justify *this declaration in the patent*, and it would be as a *determination that no mineral lands existed therein.*"

The court by the word 'declaration' was referring to a statement of the quality of the land which it said should be inserted in the patent. The decision in the *Barden* case was only reached after much discussion and labor on part of this court and Judge Ross swept the decision aside, saying no patent was before the court for consideration, but we contend that if that portion of the *Barden* opinion relating to a patent and its functions be eliminated nothing will be left and the subsequent fifty or more decisions relating to patents, based on the *Barden* opinion, will become *functus officio.*

As to the fact that the S. P. R. R. Co. simply filed its list of selected lands with the local officers at Visalia, (California), and they issued a certificate they could find no mineral claim pending in their office, and that the examiners in the mineral division of the general land

office at Washington also certified there were no mining filings in their records, proves nothing, and is no proof of the non-mineral character of the land. *That fact is tersely pointed out in the Barden case at page* 320.

Now, how did the demurring defendants meet the *Barden* case? They do it in this way. They cited the rulings in the cases of *Cowell v. Lammers,* 21 *F.* 200, and *Francoeur v. Newhouse,* 40 *F.* 621, *and Shaw v. Kellogg,* 170 U. S. 312, and a ruling, concerning a perfect patent issued under a perfect record by *Secretary Hitchcock,* 32 *L. D.* 342.

Now as to *Cowell v. Lammers:* Judge Sawyer was an insistent and consistent defender of the legal proposition that only *known* mineral lands were excluded from railroad grants. That was the sole basis of his decisions in *Cowell-Lammers* and *Francour-Newhouse* cases, and that was the sole base of his decision in *Barden* case when it came up before him at circuit, and when the Federal Supreme Court reversed the *Barden* ruling made by Judge Sawyer and established the rule that *unknown mineral lands* were excluded from railroad land grants, then the rulings of Judge Sawyer fell, as they were all based on the single proposition that only *known* mineral lands were excluded from the railroad land grants, and that *unknown mineral* lands passed under the grant to the railroad com-

pany, that there was consequently no authority for the inclusion in the patent of an exception of *unknown mineral lands,* and that was the reason why he held as he did concerning the invalidity of the exception and the invalidity of a mining location made in the presence of a reserved and excepted patent of "unknown" mineral lands. Such ideas are amplified in *Francour-Newhouse* case, and when the *Barden* case was before him at circuit he held that the unknown mineral lands passed under the grant *and the patent added nothing to the title.* (46 *Fed.* —.) If the defendant railroad company is still insistent that the ruling of Judge Sawyer must control this controversy, we will be curious to learn how they will treat the final expression of Judge Sawyer on the subject *"that the patent adds nothing to the title."*

Shaw v. Kellogg, 170 U. S. 312, cited by the demurring defendants, is only particularly important in one instance, and that is where (p. 341) Justice Brewer cites the *Barden* case as to the necessity for an examination of the land by the interior department and its determination, and expressing in the patent *that the land is non-mineral* before a grant of *agricultural land* passes unassailable to the grantee. The syllabus reads as follows:

> "In 1860 congress granted a quantity of land in New Mexico in fulfillment of a grant of non-mineral land made by Mexico before its transfer, the land

to be selected by the grantees and the surveyor general to survey and locate the lands selected, and thus determine whether it was such as the grantee might select. The grantees made their selection, and after considerable correspondence as to the forms of the application, and as to evidence that the lands were not mineral lands, *the surveyor general, under direction of the land department, approved the selection and made the survey and location. The land department approved the survey, field notes and plats,* and the parties were notified thereof, *but no patent was issued, as congress had not provided for such issue. The land department noted on its maps that this tract had been segregated from the public domain and had become private property, and so reported to congress, and that body never questioned the validity of its action. The grantees entered into possession. fenced the tract and paid all taxes assessed upon it as a private property, by the state.* Held, that the action taken by the land department was a finality, and that the title passed, all having been done which was prescribed by the statute." (End of syllabus.)

It will be remembered that the "Baca Grant" excluded only *known* mineral lands and Mr. Justice Brewer held accordingly that an exception of *"unknown"* mineral lands *would be a limitation of the grant.* That, coupled with finality and actual decision of character of land, was the basis of his decision and is the one we are contending for.

The surveyor general, under the express direction of the land department, and congressional direction, examined the land for mineral, and after such examination *reported the land* to be non-mineral, and that report was *approved* by the land department, and consequently there was a square determination and adjudication by the land department that the land was non-mineral, and thereupon the title vested in the grantees. And that was the end of the matter, and of course after such a final determination, no one contends that the subsequent discovery of mineral would upset the confirmed congressional title. In our case the "subsequent" discovery of mineral is only material, possibly, as adding to our right to make a relocation, as both the S. P. R. R. Co. and the major title, the United States, admit the lands in controversy are extraordinary mineral lands, the richest in the world! In the *Shaw-Kellogg* case Judge Brewer said (p. 332):

> *"The tract thus located was, as a whole, to be non-mineral. No provision was made for indemnity land in case mineral should be found in any section or quarter section, so that when the location was perfected the title passed to all the lands or none."*

It will be noted this court stated the land *as a whole* was to be mineral and if the surveyor general had made one min-

eral discovery the entire grant would have failed as would a homestead selection. *In our case no harm can result to the railroad company, as the lieu land still exists.*

At page 334:

"It will also be perceived, the surveyor general as well as registrar and receiver of the land office each *certify* that the land *was non-mineral.* * * * " (They did not simply certify as here that no mineral claims were pending in the local land office.)

At page 337 he said: *"In this, three things are to be noticed:*

"1. That the surveyor general, the officer specially designated (by congress) to make the survey and location, the one primarily charged with the duty of determining its character, *decided the land was non-mineral. His certificate to that effect is unqualified.* His certificate of approval to the field notes and to the survey is the same. *So far, therefore, as his action is concerned, there was an adjudication that the land was non-mineral.*

"2. The land department directed the matter to be closed, specified how it should be closed, and recorded and filed without question the report of the surveyor general's action.

"3. The only qualification is found in the direction of the land department followed by the action of the surveyor general in adding to his certificate of approval of the plat, that it is 'subject to the conditions and provisions of the act of con-

> gress of June 21st, 1860.' *There was no reservation in the matter for further consideration* in the land department or by the surveyor general. There was a *finality* so far as they are concerned,"

and Judge Brewer points out in his opinion that the grant was only to exclude "known" mineral lands without lieu provision and applied to the case the rule in the *"known"* mineral case of *Deffebach v. Hawke* expressly *repudiated* in the *Barden* case in so far as "unknown" lands were concerned. Counsel argued below that the grant was similar to the railroad grants so far as the quality of the land was concerned but the difference is that the grant did not vest until it was actually determined there was no known mines in the lands and that they were not mineral; in other words the Baca grant was a float and the grantees could keep on making selections until they found a tract that was finally determined to be non-mineral and then title vested.

The final reason why the *Shaw-Kellogg* case has no application to this controversy is, that it was an instance of a grant made pursuant to the treaty obligations arising under the treaty of *Guadalupe-Hidalgo* and over which the courts could exercise no jurisdiction either to control the survey or the action of congress, which reserved the entire matter to the political department of the government.

This court has frequently held, so often in fact that no citation of authority is necessary, that except in instances of fraud, imposition or mistake, the courts could neither revise nor supervise the action of congress in confirming Mexican grants nor revise or supervise the acts of those persons or departments delegated by congress to fix the boundaries of the grant or any matter in connection of the same unless congress had expressly provided for judicial supervision.

The Baca Grant was made by congress pursuant to an obligation arising out of its treaty obligations and in the exercise of the sovereign power of the government and in making the grant, it provided for an examination and survey of the floating grant and vested all authority, that it saw fit to delegate in the surveyor general of New Mexico, and he having exercised that jurisdiction, there was a complete finality that the court could neither revise nor supervise, and consequently it was neither within the power of the land department to limit or to enlarge the terms of the grant nor of the court to change the boundaries or to alter the survey and consequently any expression of opinion of Mr. Justice Brewer upon other matters, such as what might or might not be included in a patent was merely *obiter dictum,* and this is especially so when it is recalled that no patent was

before the court for its consideration and the act of congress did not provide for a patent and there was no authority in law for the issuance of a patent, while in the *Barden* case the grant under consideration expressly provided for a patent and the legal title to the land granted remained in the United States until the patent provided for in the grant was issued.

Then we come to the ruling of Secretary Hitchcock in 32 L. D. 342. We will take the same up by paragraph, with very brief comment, though we desire to say at the outset, as the base for these comments, that whether *the ruling was right or wrong,* it has no application to the patent at the bar *as it refers to a patent issued after examination and decision* and in accordance with the rules of the land department; a perfect patent founded on a perfect record.

It will be noted by this court that under the present administrator, the secretary of the interior has returned to the old practice of inserting the mineral exception:—so that as a matter of fact the opinion of Secretary Hitchcock made up without hearing or argument or contest on the application of a railroad grantee *has been reversed!* The case reads:

"Railroad Grant—Patent—Exception of Mineral Lands.—Northern Pacific Railway Co. There is no authority for the insertion, in patents issued under railroad land grants, of the clause,

'excepting all mineral land, should any such be found in the tracts aforesaid'; and directions are given that in all future railroad land grant patents said excepting clause be excluded.—Secretary Hitchcock to the commissioner of the general land office, December 10, 1903.

"The department *has considered the request* by the Northern Pacific Railway Company, successor in interest to the Northern Pacific Railroad Company, that you be instructed to eliminate the following clause from patents issued under its land grant, namely: 'yet excluding and excepting all mineral land should any such be found in the tracts aforesaid, but this exclusion and exception according to the terms of the statute shall not be held to include iron or coal lands.'

"In reporting upon said request your office letter of December 11, 1901, states that it is questionable whether there is authority for its insertion, *but that this excepting clause has always been introduced into the patents issued to the company, which now cover millions of acres of its grant, and this has also been done in the patents issued under all other railroad land grants having a like excepting clause.*"

It will be seen

(a) The ruling was made without notice, contest or hearing, on the *ex prate* application of a railroad! and thus a rule of action that existed in the department of the interior for forty years, and followed by men like Lamar, Vilas, Noble, Teller, and others, goes by

the board on a misunderstanding that the "exception" was only to be inserted in instances when there had *been no* examination and decision!

Then follows:

> "Mineral Lands Excepted. All mineral lands, other than coal and iron, are excluded from the Northern Pacific land grant, whether known or unknown, at the time of the attachment of rights hereunder, either by definite location or selection. *Barden v. Northern Pacific R. R. Co.*, 154 *U. S.* 288."

There is no significance in the above paragraph *except*, as will be seen all through the ruling, that it was the intention of the department *to follow* the *Barden* case, and is an attempt on the part of the department to construe the same.

"Who Shall Determine The Character Of The Land Within The Limits Of A Railroad Grant?" The character of the lands within the limits of railroad land grants must, of necessity, be primarily determined by the land department. In *Litchfield v. Register and Receiver*, 9 *Wall.* 575, 577, *it was said:*

> "The very first duty which the register is called on to perform, when an application is made to him to enter a tract of land, is to ascertain whether it is subject to entry. This depends upon a variety of circumstances. Has there been a proclamation offering it for sale? Has it been reserved by any action of congress, or

of the proper department? Has it been granted by any act of congress, or has it been sold already? These are all questions for him to decide, and they require the exercise of judgment and discretion."

All this clearly shows that an examination and a decision is contemplated, not a mere issuance of a patent as in this case without any examination, decision or adjudication.

In *Steel v. Smelting Company*, 106 *U. S.* 447, 450, it was said:

"We have so often had occasion to speak of the land department, the object of its creation, and the powers it possesses in the alienation by patent of portions of the public lands, that it creates an unpleasant surprise to find that counsel, in discussing the effect to be given to the action of that department, overlook our decisions on the subject. That department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, *and to see that requirements of different acts of congress are fully complied with.* Necessarily, therefore, *it must consider and pass upon the qualifications of the applicant,* the acts he has performed to secure the title, *the nature of the land,* and whether it is of the class which is open to sale. *Its judgment upon these matters* is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation. Such has been the uniform language of this court in repeated decisions."

Here, again, is seen the necessity of an examination and a *decision* as to jurisdictional facts.

In *Burfenning v. Chicago, St. Paul, etc.*, 163 U. S. 321, 323, it was said:

> "Whether, for instance, a certain tract is swamp land or not, saline land or not, *mineral land or not, presents a question of fact not resting on record, dependent on oral testimony;* and it cannot be doubted *that the decision* of the land department, one way or the other, in reference to these questions, is conclusive and not open to re-litigation in the courts, *except in those cases of fraud, etc.*, which permit any determination to be re-examined. *Johnson v. Towsley*, 13 *Wall.* 72; *Smelting Co. v. Kemp*, 104 *U. S.* 636; *Steel v. Smelting Co.*, 106 *U. S.* 447; *Wright v. Roseberry*, 121 *U. S.* 488; *Heath v. Wallace*, 138 *U. S.* 573; *McCormick v. Hayes*, 159 *U. S.* 332."

How can a question of fact be determined unless there be a decision on it?

In *Northern Pacific R. R. Co. v. Sanders*, 166 U. S. 620, 635, it was said:

> "Whether the lands sought to be purchased as mineral lands were of that character *was a matter for the determination*, in the first instance, of the land department; and there was jurisdiction in that department to pass upon *every question arising upon applications* to purchase them as mineral lands."

In *Barden v. Northern Pacific R. R. Co., supra,* (pp. 328, 329), it was said:

> "If the land department *must decide* what lands shall not be patented because reserved, sold, granted, or otherwise appropriated, or because not free from pre-emption or other claims or rights at the time the line of the road is definitely fixed, *it must also decide whether lands are excepted because they are mineral lands.* It has always exercised this jurisdiction in patenting lands which were alleged to be mineral, *or in refusing to patent them because the evidence was insufficient to show* that they contained minerals, in such quantities as to justify the issue of the patent."

These cases clearly establish the jurisdiction of the land department in the premises.

We have no quarrel with the ruling as to the jurisdiction and the DUTY of the department, *but we say it must be exercised.*

> "P r o c eedings Before the Land Department Had Upon Lists and Selections Made of Lands Under a Railroad Land Grant Preceding the Issue of Patents Thereon.—All such lists and selections are required to be filed in the local land office of the district in which the lands are situate, and are by the officers of that district carefully examined in connection with the plats and records on file in their office. If found satisfactory, they are forwarded to your office, where, under the circular of July 9, 1894 (19

L. D. 21), they are again thoroughly examined in connection with the records and files of your office, and all tracts within a radius of six miles of any mineral entry, claim or location, are eliminated therefrom. A supplemental list of these elminated tracts is then prepared and the railroad company is required to publish the same for a period of sixty days. From such published list is eliminated all lands that have been protested, contested, or claimed to be more valuable for mineral than for agricultural purposes, and hearings are ordered to determine the character of such lands. Those lands that are not protested, contested or claimed as mineral are included in what is known as clear lists and certified to this department for approval, and upon such approval the patent of the United States issues."

And the court will remember that *not one* of these requirements was had in the case of the patent at bar. The S. P. R. R. Co. is simply trying to create a new rule which will give to it the land to which it is not entitled, which the congress never gave to it!

When the court reads the above paragraph it will remember that the circular of July 9, 1894, went into force *one* day before the patent issued! If this rule controls the application then pending it will be found that the rule required affidavits made by the officers and agents of the railroad that they had been all over the lands selected and knew their quality, that they were non-mineral, etc., and later in the cir-

cular it is pointed out that this requirement *shall be waived in instances of pending applications when there is a non-mineral affidavit for every* 40 *acres!*—making necessary in case of the patent at bar 11,022 affidavits, or covering that number of quarter sections, and still Mr. Madden simply said the lands were non-interdicted mineral lands (whatever that means), and he got a patent for 444,000 acres of land! in which our mineral lands were included.

There was no proof, no publication in our case. The record was *two* days at Visalia, then it went to Washington and remained pigeonholed until a few days (13 days) before patent issued! That's all!

The ruling continues:

> "Issue of Patent for Lands Under a Railroad Land Grant Determinative of the Character of the Lands Patented.—As before shown, it is the duty of the land department *to determine primarily the character of the lands within the limits of all railroad land grants*, and the usual rule fixing a time for the attachment of rights under such grants does not *stop inquiry into this matter by that department.* When, however, the land department, *charged with this duty, and after due investigation of the matter as provided for by its rules and regulations*, patent lands as falling within the terms of these grants, such action is necessarily determinative of the character of the lands patented!

"Effect of Such Determination.—When the law has confined to a special tribunal the authority to *hear and determine certain matters,* its *determination,* in the absence of fraud, is conclusive upon all others."

Johnson v. Towsley, 13 *Wall.* 72, 83.

Very true, but *if it has not heard* and has not decided and no judgment has been made, will counsel contend that the patent is an adjudication of every fact that might be necessary to uphold the result of a decision, namely, the patent?

In the case of *Barden v. Northern Pacific R. R. Co., supra,* the court, (*pages* 330 *and* 331), states:

"It is true that the patent has been issued in many instances *without the investigation* and consideration which the public interest requires; but if that has been done without fraud, though unadvisedly by officers of the government charged with the duty of supervising and attending to the preparation and issue of such patents, the consequence must be borne by the government until by further legislation a stricter regard to their duties in that respect can *be enforced upon them. The fact remains that under the law the duty of determining the character of the lands granted by congress, and stating it in instruments transferring the title of the government to the grantees,* reposes in officers of the land department. *Until such patent is issued, defining the character of the land granted, and*

showing that it is non-mineral, it will not comply with the act of congress in which the grant before us was made to plaintiff. *The grant, even when all the acts required of the grantees are performed, only passes a title to non-mineral lands; but a patent issued in proper form,* upon a judgment, rendered after a due examination of the subject by officers of the land department, charged with its preparation and issue, *that the lands were non-mineral,* would, unless set aside and annulled by direct proceedings, estop the government from contending to the contrary, and, as we have already said, in the absence of fraud in the officers of the department, would be conclusive in proceedings respecting the title."

"In certain cases involving the question as to the character of lands claimed under the grant made to the states of swamp and overflowed lands, the courts *have permitted the introduction of oral evidence to determine* the character of such lands, but these cases are carefully considered in the case of *McCormick v. Hayes, supra,* where it is said by the court (page 342 of its opinion):

"There is in this case no conflict with what we decide in the present case, but, on the contrary, *the strongest implication, that if, in that case, the secretary had made any decision,* the evidence would have been excluded."

"The secretary had made any decision!" That is our case; he made none; he did nothing. We charge it; it must be assumed to be true here, and the record proves it.

Not only the Barden case, the Shaw-Kellogg case, but the cases of McCormick-Hayes and Wright-Roseberry (and there are no cases to the contrary) support the proposition that until there is an examination, determination and expression there is no finality. If the S. P. wants a finality that will forever preclude every nomadic or speculative litigant from attacking its innocent grantees, etc., etc., let it have the court pass on and forever settle the agricultural quality of the greatest and richest mineral lands in the world.

> "It follows that, in the absence of fraud, the determination effected by the issue of patent as to the character of the lands patented is conclusive, and that the insertion of the clause hereinbefore referred to is without effect and can serve no good purpose."
>
> "Exceptions Contained in Letters Patent of the United States.—It has been shown that it is as much the duty of the land department to determine whether lands are excepted from a railroad land grant because mineral in character, as it is to determine whether they are excluded because embraced in some other term of exception found in the granting act, *that the issue of patent under such a grant* is a determination that the lands patented are of the character granted, and that in the absence of fraud such determination is conclusive."

The error here made is in concluding that the patent is the judgment while in fact it is the result of the judgment and

if there was no judgment there can be no conclusive judgment and the rules to which the secretary was referring to provided *for an antecedent* examination and determination.

Why, then, should one term of exception be carried into the patent when all others are excluded?

In *Davis v. Weibbold*, 139 *U. S.* 507, the question as to the effect to be given to excepting clauses found in patents issued under acts of congress providing for the disposal of public lands, was fully considered by the court, and on pages 527-528 of its opinion it was said:

> "But we do not attach any importance to the exception, for the officers of the land department, being merely agents of the government, have no authority to insert in a patent any other terms than those of conveyance, with recitals showing compliance with the conditions which the law prescribes. Could they insert clauses in patents at their own discretion they could limit or enlarge their effect without warrant of law. *The patent of a mining claim carries with it such rights to the land which includes the claim as the law confers, and no others, and these rights can neither be enlarged nor diminished by any reservation of the officers of the land department*, resting for their fitness only upon the judgment of those officers."

Deffebach v. Hawke, 115 *U. S.* 392, 406.

While it is true that a reservation of streets, buildings, blocks, alleys in a mining patent would *diminish* the grant, it cannot be successfully contended that an exception of "*all* mineral lands" *diminished* a grant that expressly precluded *known, unknown* and all kinds of mineral land from its operation! Surely *Davis-Weibbold* is not authority against us?

Such was the only exception in the *Deffebach-Hawke* case. The exception was not authorized by the mining law and as under the mining law a patent *carries all the surface* of the land, in fee simple, it would be simply absurd to reserve some of the surface after the land department had decided the applicant had earned and was entitled to his patent, but there is nothing in common with this decision and an instance where *unknown* mineral was barred by the grant.

In *Deffebach v. Hawke* it was said:

> "The land officers, who are merely agents of the law, had no authority to insert in the patent any other terms than those of conveyance, *with recitals showing a compliance with the law* and the conditions which it prescribed."

We are content to stand on the citation from the *Deffebach-Hawke* case as we admit that a patent r*eciting* compliance with the law and the conditions which it prescribed

would be conclusive, that is an adjudication and statement in the patent, that the land was non-mineral and agricultural would be forever conclusive. But how may such citations and ruling support our patent? Any suggestion that it does is an absurdity.

> "There is clearly, therefore, no warrant for the insertion in patents, issued under the railroad land grants, of the clause 'excepting all mineral land should any such be found in the tracts aforesaid.'"

If any statement in this connection were deemed necessary in the patent, which is not believed to be the case, it should be to the effect that the lands patented are found to be non-mineral in character and otherwise subject to the grant. *The letter* from the railway company, now under consideration, in referring to said excepting clause, states:

> "Whilst its inclusion cannot in law lessen the title acquired by the company, it can and frequently does induce innocent third parties not well versed in the law to engage in vexatious and expensive litigation, in the belief that there may be expected from the patent to the railroad company any minerals which shall be found in the patented lands thereafter."
>
> "After careful consideration of the matter, therefore, the request is granted, and you are directed, in future, to exclude said excepting clause from all railroad land grant patents."

It may be noted in passing that, 1911, the secretary of the interior, acting under the advice of the department of justice, reversed the ruling of Secretary Hitchcock by returning to the practice of inserting the mineral exception in railroad patents.

There are just *four things to be noticed* in connection with these concluding paragraphs of the Hitchcock ruling, namely:

1. That it was clearly and distinctly pointed out in the *Barden* case that the *Weibbold-Davis* and *Deffebach-Hawke* cases did not and could not apply *to a railroad land grant case,* and that they solely refer to grants that only precluded from their operation *"known"* mineral lands and consequently an exception of "unknown" mineral lands *would be a limitation* of such a grant, while in the railroad land grants both *known and unknown* mineral lands were precluded from passing!

2. "No innocent third persons" or others were ever defeated in any court at any time or place by the N. P. R. R. Co. in any action where the mineral exception existed. If such cases exist counsel will be glad to produce them. *They cannot.*

3. The most surprising thing about the Hitchcock ruling is, that, citing the *Barden* decision *in extenso* in search for

a precedent against a mineral exception, the department overlooked entirely that portion of the *Barden* case which reads as follows (p. 331):

> *"The government cannot be reasonably expected to issue its patent, and is not authorized to do so, without excepting mineral lands, until it has had the opportunity to have the country, or that part of it for which the patent is sought, sufficiently explored to justify this decalaration."*

Judge Ross intimates that this part of the *Barden* decision is *obiter dictum* as no patent was before the court; if so, all other portions of the opinion relating to patents falls under the same criticism as does the observations of Judge Brewer in the *Shaw-Kellogg* case concerning patents as there was *no* patent in the latter case.

The final suggestion is that Secretary Hitchcock was passing on the question, should a mineral exception be inserted in a patent *where the lands had been examined and their quality properly passed on and following a statement in the patent that the lands were not mineral.*

With such a proposition we have no contest, *but* will anyone claim that it applies *to an imperfect patent founded on an imperfect record?* If so, it means that the cogent, strong and positive ruling and opinion of the

court of last resort, speaking *ex cathedra* is a lifeless and puerile thing, for no language could make clearer that a patent issuing to a railroad company under a railroad land grant *is not* conclusive until there has been by the United States land department an examination of the land, an actual determination of its quality and the expression of that determination in the patent, and in the absence of such *examination* and *determination* there could be no expression of quality that would be conclusive, that such determination is yet to be made, and that by reason of the fact, coupled with the mineral exception, the legal title to all mineral lands within the tracts described in the patent has not passed from the United States, and such mineral lands are subject to location under the mining laws of the United States, and of this case Judge Ross says it was *obiter* because there was no patent before the court and cites in that connection as the base of his opinion, *Shaw v. Kellogg,* construing a grant that did not provide for a patent! Surely, if the *Barden* case is *obiter* the *Shaw-Kellogg* is also, for the former provided for a patent while the latter grant *did not!*

So far as may be ascertained from the opinion of Judge Ross it would seem that he had not in mind at all the *form* of the patent in this suit except as in so far as the mineral exception was concerned.

This same proposition of the right of the government to insert a mineral exception in its patent and of the non-exclusiveness of such a patent is further exemplified in other cases.

In the syllabus of *Standard Quicksilver Co. v. Habishaw*, 132 Cal. 115, which is an accurate digest of the case, we find:

> "It is the peculiar province of the land department of the United States *before issuing a patent* to any land applied for, *to determine as a question of fact, the character of the land*, as whether it is valuable for minerals within the meaning of that term or agricultural ground; and its *determination* that the land is *agricultural* upon issuing a patent to a homestead settler, *without reservation of mineral lands*, is conclusive against a subsequent mining claimant of any part of the mineral land not *known* to be valuable for minerals at the time of patent."

The California Supreme Court in this instance was not speaking of any particular kind of patent, but was referring to the conclusiveness of a patent stating that a patent is conclusive unless it otherwise appears on its face.

This case is important in many respects. Justice Brewer, in *Shaw v. Kellogg*, in reference to a patent to a homestead claimant, made mention of the fact that it was

not competent to insert in such a patent a mineral reservation and counsel in the court below succeeded in having Judge Ross apply that doctrine to this suit. But Judge Brewer, *enumerating* all instances where exceptions of unknown mineral land should not be inserted, *did not include* railroad land grant patents! Why not? The difference is striking, apparent, elementary. The one rule applies to *"known"* mineral lands and that is the rule of the *Shaw-Kellogg* and kindred grants and cases. Justice Brewer says so in his opinion and such is the *base* of his opinion. The other is the rule of the *Barden* case, "unknown" mineral lands, and that rule as pointed out in the Federal Supreme Court in the *Barden* case *is the rule applicable* to the land grant cases and of this suit and differentiates the same from the *Shaw-Kellogg, Cowell-Lammers, Davis-Weibbold* and *Deffebach-Hawke* cases, and Judge Bean adopted the correct rule while Judge Ross fell into the error of applying the rule in "known" mineral land grants and cases to "unknown" mineral land grants and cases. Judge Sawyer fell into the same error in the *Cowell-Lammers* and *Francour-Newhouse* cases, where at great length he argued that the mineral land exception was void *because* only *known* mineral land was precluded from the operation of the grant! *"A verbis legis non est recedendum."*

Since early days, even before the establishment of the department of the interior, and even as early as 1834, it has been customary to insert reservations in patents. (17 *Atty. General's Opinions, p.* 248; *Lamprey v. State* (*Minn.*) 38 *Am. St. Rep.* 541, *and Reynolds v. Iron-Silver Mining Co.,* 116 *U. S.* 687.)

In the latter case the *Silver Mining Co.* brought suit in ejectment to recover the possession of certain lands which the plaintiff held under a patent which the government had issued under a placer mining claim. The defendants below asserted the right under which they were working in lode claims which were older than the title of the plaintiff. The patent itself declared it was subject to the following restrictions (stating them). The court said:

> *"Without deciding on the effect of the acceptance, without protest,* of a patent with such exceptions in the granting clause where their insertion in the voluntary act of the officers who execute the instrument, it is sufficient to say that these conditions *but give expression to the intent of the statute."*

Will it be contended here that our exception fails to give expression *to the intent of the statute?* If the exception but gives expression *to the intent of the statute*, can it be said the insertion of the intent of the statute

in the patent is nugatory or constitutes a limitation of the grant, *or diminishes or increases* or in any way deprives the defendant *of an acre* of land that congress intended should pass to it? The proposition that the mineral exception in our patent could in any way diminish the grant of July 27, 1866, *is simply* absurd.

From the above it clearly appears that the issuing of a patent with the mineral exception, the exception being in accordance with the mineral exception in the granting act, and the acceptance, *without protest,* of such a patent by the grantee, is a recognition of the fact that no legal title to the excepted and reserved lands was ever intended to or did pass, and that by such patent the patentee obtained no title to the excepted lands whatever. This view is borne out by the attitude and conduct of the railroad company subsequent to the issue of the patent. Up to, at least, 1904, it was the policy of the grantee to insert in deeds to purchasers of the granted lands a clause *"excepting and reserving all claim of the United States to such lands as mineral lands."* (*Steese v. Hunt, 75 Cal. p.* 620; *Deed of S. P. R. R. Co. to Berry, appendix.*) So it will be seen that for 24 years the defendant railroad *upheld the validity of the mineral exception,* upheld the integrity of the patent containing the mineral exception. Again, in *Steese v. Hunt,* 75 Cal. 620, the California Supreme Court had oc-

casion to pass on the mineral exception and the rule applicable in such cases. The syllabus well expresses the case:

> *"A person claiming under a mineral location* to be entitled to the possession of land previously patented to the S. P. R. R. Co. in pursuance to a grant made to that company, in order to establish his right of possession as against a person claiming under the patent, must clearly show that at the date of the patent the land under the conditions then existing was more valuable for mining than for agriculture and was known to be such, and in determining the relative value of the land for such purposes subsequent changes in the conditions affecting it cannot be considered."

This ruling was made *independent* of the mining exception and was made on the theory that if the railroad company KNEW at the time of patent that the land was more *valuable* for mining than for *agriculture, the patent was void,* carried no title and was subject to attack by a *subsequent mining locator,* independent of the mineral exception. The mineral exception, however, is referred to in the opinion, and there was no question of the legality of the same; and, as we are told, scores of such cases never passed beyond the Superior Court *as even the defendant railroad company inserted the United States mineral exception in its deeds and contracts to convey land.* Such was our *exact*

contention in the court below, coupled with the basic claim that, in any event, the mineral exception saved the legal title to the United States.

In meeting the foregoing authorities the demurring defendants were compelled, in the court below, to contend that rule so applied was not recognized by Judge Sawyer in *Cowell v. Lammers*, and not endorsed by *Lindley* in his work on Mines.

The former objection is met by the answer that the *Cowell-Lammers opinion* fell under the *Barden* decision for the *Cowell-Lammers* opinion was rendered under the express theory and *insistent contention* of Judge Sawyer, that *only known mineral lands* were precluded by the granting act! And the opinion of Mr. Lindley that the California decisions upholding the validity of mineral exception *were wrong, is based solely on Cowell-Lammers!* In fact, *Cowell-Lammers is the sole text* of both the S. P. R. R. Co. and Mr. Lindley, who evidently has not read what Judge Sawyer said about the case in *Francour v. Newhouse!*

Now, if Judge Sawyer was wrong, Mr. Lindley is also wrong. The *Barden* case holds they are both wrong and as the Supreme Court can do no wrong it necessarily follows that Judge Sawyer and Mr. Lindley cannot be successfully cited here. The whole case of the defendant is built upon the *exploded* cases

of *Cowell-Lammers* and *Francour v. Newhouse*, and both those cases were predicated on the single proposition that the *mineral exception* in the patent *was void* because only *"known" mineral lands were precluded by the grant!* And *Shaw v. Kellogg* turned on the expressed holding by the Supreme Court that only *"known"* mineral lands were contemplated by the *Baca grant*, and consequently any exception of *"unknown"* mineral lands was authorized, being a limitation of a grant that *expressly carried "unknown"* mineral lands!

Judge Sawyer was very explicit in *Francour v. Newhouse* and tells why and how he decided the issue in *Cowell v. Lammers* and in the *Barden* case, while at circuit (46 F.) he said that under a railroad grant a patent was nothing as the title to the railroad company *passed by* the *grant* and the *patent added* nothing to the title and that was one of the reasons why this court had to take up the question of the office and effect of a patent in the *Barden* case.

In the court below counsel attempted to establish the claim that the patent having issued the court must assume, although the contrary was admitted by the demurrer, that the land was not located; that no discoveries had been made or if locations under decisions had been made, that the same had been abandoned. The proposition is self-answering.

It has no foundation in authority, in law or in morals, and especially so in view of the fact that the S. P. R. R. Co. has never exercised physical domination over any part of the land and no widows or orphans are in tears at the bar of this court! And there are no innocent purchasers here, except, possibly, the Kern Trading and Oil Co., and the degree of its *innocence* is not yet apparent.

Dropping back into the California state cases on this subject of the conclusiveness of a restricted and reserved or other patent, we find a solid wall of cases confronting the defendants. Judge Ross did not attempt to differentiate them or any one of them. None of them are mentioned in his opinion; he criticises none of the opinions of his former brethren on the state supreme bench nor reverts to his former utterances! He simply took the basic position that an exception of "all mineral lands" *was a limitation* of and *diminished* a grant that absolutely *precluded* the passing of "all mineral lands" known and unknown and such basic error resulted in his holding the exception *was nugatory and void!* In the court below counsel cited one portion of the opinion rendered in *Gale v. Best*, 78 Cal. 235, (decided prior to the *Barden* case), to the effect the issuance of the patent created the presumption that the land was agricultural, but the court immediately added:

> "When a patent issues under a law which provides for the disposal of public lands as agricultural lands and there is no reservation in the law except a general reservation of mineral lands *and no reservation at all in the patent,* the patent is a conclusive determination by the government that the land is agricultural and it is not competent, therefore, in an action in a *court of law* to re-open the question of the character of the land."

That is the rule in California today and in all the cases that have arisen under the rule it will be found on examination of the transcripts on file in the state law library at Sacramento that in none of them is it the fact that it was ever held that a patent was conclusive in the absence of an *actual examination and actual determination* of the subject matter of fact in the federal land office before issuance of patent.

Take, for instance, the case of *Paterson v. Ogden,* 141 Cal. 43, where it was said the issuance of a United States patent *as agricultural in character* is conclusive, but an examination of the record discloses that there was a homestead which, through regular channels and in the regular method of the law, ripened into a patent *which disclosed* the *agricultural quality of the land* and, of course, this was an instance of *"known"* mineral land cases, as was *Gale v. Best.* The same state of facts with complete records in the federal land office, including actual examina-

tion and actual determination, together with the same state rule, is to be found in

Irvine v. Tarbat, 105 Cal. 243;
Green v. Hayes, 70 Cal. 276;
Williams v. San Pedro;
Stewart v. Sutherland, 93 Cal. 270;
Dreyfus v. Badger, 108 Cal. 65;
Saunders v. La Purisima, 125 Id. 164-5;
Standard, etc. v. Habishaw, 132 Id. 155;
Hermocilla v. Hubbell, 89 Id. 5.

The state rule (and which is the federal rule) is well exemplified by the opinion of Judge McFarland in *Richards v. Wolfling,* 98 Cal. 195, in which he said:

> "The court further said (*Sparks v. Pierce,* 115 U. S. 408): 'The issue of the patent to 'A' was equivalent to a determination by the United States in an adverse proceeding to which, in law, B was a party, that A had title to the discovery superior to that of B and consequently B's location was invalid.' But the record in that case and in the citation shows that there had been an actual contest in the *federal land office between the parties* and that the contest *had been referred back to the state Superior Court.*"

This position is well illustrated by the decisions in *Reynolds v. Iron Silver Mining Co.,* 116 U. S. 687, and *De Cambra v. Rogers,* 189 U. S. 119.

In the former a patent had issued for a placer mining claim and it was held not conclusive as against a locator of a lode claim within the placer limits. There had been a complete determination in the land office on the question of the placer claims but no determination was made concerning the existing of lode claims. The statute on which the patent was issued declared that it should not confer any right to a vein *known* to exist within the time the grant was made, just as our granting act forbade the passing of *all* mineral lands. No presumption seemed to attend the unfortunate patent in that case, and no presumption arose that there were no lode claims and in a private suit the patent fell! Counsel contended the case was inapplicable and that the patent was not conclusive in such instances because a *placer* applicant *did* not, *could* not apply for known lodes and thereby the question was not determined in the land office! which is our actual contention here, namely, that a patent is only conclusive in matters that the antecedent record will show were *actually* determined! The latter case arose in California (132 Cal. 502) and on writ of error was affrmed. The court said:

> "That a contest (between the parties) ensued which was finally *decided* by the secretary of the interior in favor of Rogers and the land patented to his widow and son. The cross-complaint further averred that, although the decision ap-

parently rendered by the secretary of the interior was signed by him, yet in fact for the want of time and opportunity the secretary had not read or heard read the evidence in the contested case and simply signed his name to a report prepared by one of the clerks in the department.

"This cross-complaint states no question of law decided in these contest proceedings in the land department adversely to De Cambra. Indeed, the grounds of the decision are not disclosed. *It appears that De Cambra offered testimony* showing his qualifications, settlement, occupation, etc., and it is stated *some evidence* was given in support of the Rogers application. * * * *But it is well settled that the decisions* of the land department upon questions of fact is conclusive in the courts. (*Burfenning v. Chicago, etc.*, 163 U. S. 323; *Johnson v. Drew*, 171 U. S. 99; *Gardner v. Bonestell*, 180 U. S. 363)."

And then the court goes on to say that when the secretary *has made a decision it is conclusive*, a reiteration running through all the cases that an examination of and a decision on a question of fact, right or wrong, honest or dishonest, is a finality, but that there is no finality until there be such an examination and decision. This view is fortified by the much relied on ruling by Secretary Hitchcock that the insertion in patents of the mineral exception is not justified by the law. It will be remembered that the secretary *was not passing on the patent at bar or on one executed under like circumstances or*

similar to it. He was passing on a patent, as will be seen by his opinion (32 L. D. p. 342), *founded on a perfect record;* where there had been proper proof *that each* 40 *acres* had been examined and *proven to be non-mineral.* This is apparent because he is discussing in 1904, a patent issued pursuant to the rules of July 9, 1894, *which requires such proof.* He was passing on a *patent about to be issued in compliance with the law, with the rules and practice of the department, in an instance where there had been complete examination and actual determination; where adverse claims had been advertised for;* and then he decided that in such an instance, after it had been legally and lawfully and properly determined that the land was agricultural, he would follow such determination by issuing a patent in proper form, with the necessary recitals and statements, and consequently it would be a nugatory act to insert an exception of unknown mineral lands in the patent after it had been determined that the land was agricultural and contanied *no* minerals. But this was long after our patent issued, which was at a time that the rules and procedure referred to were not in force and which were not followed in the case of our patent. We will instance one fact in connection with this subject. To bring the railroad company within the rule of the land office on the day the patent was issued would have required the filing or upwards of eleven thousand

affidavits or proof specifically concerning that number of legal subdivisions concerning land inspection, to carry to patent the land applied for, or, to be accurate, 11,022 affidavits. In his opinion the secretary points out what must be done before a patent may issue, and it was on that *procedure* and under those rules that the opinion was written, and not under the rules and procedure existing at the time our patent issued. *It was never contemplated to apply to such an instance as ours.* Following are the rules and procedure:

> "Proceedings Before the Land Department Had Upon Lists and Selections Made of Lands Under a Railroad Land Grant Preceding the Issue of Patents Thereon. All such lists and selections are required to be filed in the local land office of the district in which the lands are situate, and are by the officers of that district carefully examined in connection with the plats and records on file in their office. If found satisfactory, they are forwarded to your office where under the circular of July 9, 1894, (10 L. D. 21), they are again thoroughly examined in connection with the records and files of your office, and all tracts within a radius of six miles of any mineral entry, claim or location, are eliminated therefrom. A supplemental list of these eliminated tracts is then prepared and the railroad company is required to publish the same for a period of sixty days. From such published list is eliminated all lands that have been protested, contested, or claimed to be more valuable for mineral than for agri-

cultural purposes, and hearings are ordered to determine the character of such lands. Those lands that are not protested, contested or claimed as mineral are included in *what is known as clear lists and certified to this department for approval, and upon such approval the patent of the United States* issues."

And then followed this rule as to examination and determination:

"Issue of Patent for Lands Under a Railroad Land Grant Determination of the Character of the Land Patented. As before shown, it is the duty of the land department to *determine primarily* (and to 'determine primarily' means that the examination and determination must be made before the patent issues) the character of the lands within the limits of all railroad land grants, and the usual rule fixing a time for the attachment of rights under such grants does not *estop inquiry into this matter by that department.* When, however, the land department, *charged with this duty, and after due investigation* of the matter *as provided for by its rules and regulations,* patent lands as falling within the terms of these grants, *such action is necessarily determinative* of the character of the lands patented!"

All through the opinion of the secretary we find constant reference to the fact that it is his duty to investigate *and decide.* The contention of the defendant railroad company apparently is that if a secretary of the interior with the connivance and consent of the railroad

company, neglects or refuses to perform his duty, and issues, on its application, without proof, without examination, an excepted patent, that the patent is conclusive and carries the mineral land, and that the ordinary rules of *particeps criminis or in pari delicto* do not apply to a railroad corporation! That is the concrete proposition, that the corporation may take advantage of the violation of the law made possible only by its own acts! We think not. (*U. S. v. Moffitt, supra.*)

This opinion was written some ten or twelve years after the application for the patent under present consideration, and, although copious reference is made to the *Barden* case, it is to that part that treats entirely of how and in what manner a patent should be issued, namely, after examination and investigation. If otherwise, the secretary would have surely pointed out that the rules in force ten or twelve years after the patent issued did not contemplate any disagreement or noncurrence with that portion of the *Barden* case reading as follows:

> "The government cannot be reasonably expected to issue its patent, *and is not authorized to do so, without excepting mineral lands,* until it has had the opportunity to have the country, *or that part of it* for which the patent is sought, sufficiently explored to *justify this declaration* (Note: What declaration?) *in the patent* and it would be deemed as a determination that no mineral lands existed therein."

As the secretary said, he was trying to follow the *Barden* case by making up and issuing a patent that would comply with the *Barden* rule of examination, determination and expression.

Judge Ross says a patent is conclusive in the boundaries of a mining claim. This court has held to the contrary, as we will later show, but whether that observation be true or not, a patent is not conclusive of the boundaries of a railroad grant or of a Mexican grant, and a patent to the railroad company may be assailed in such instances whenever the true fact is shown.

Sanger v. Newhall, supra.

It cannot be successfully contended that the examination and determination so often referred to simply means there should be such only when there is a real contest between parties before the department, for the department has full authority on its own motion or at the instance of others to inquire into and determine the quality of the public lands.

Quinby v. Conlan, 104 U. S. 420;
Marquez v. Frisbie, 101 *Id.* 476;
Iron S. Min. Co. v. Campbell, 135 *Id.* 286.

In the court below counsel presented some fifty authorities which at first blush may seem disconcerting, but if the

court will have the patience to briefly look at each of them it will be found that while they are cited on the proposition that a patent is conclusive, it will be quickly seen that in each and every instance it is held, conversely or inversely, but always clearly directly, that a patent is conclusive only after an examination of and actual determination affecting the subject-matter. We will briefly digest them for the convenience of the court, and if our digest be fallacious, counsel will undoubtedly be heard.

1. *U. S. v. Winona, etc. R. R.*, 67 *F.* 948:

It was said in this case that the test of jurisdiction is whether the tribunal has power to enter upon the inquiry, *not whether its conclusion is right or wrong.*

In that case there was a complete examination and actual adjudication of the facts.

2. *French v. Fyan*, 93 U. S. 169:

Complete examination and actual decision on facts before issuance of patent.

3. *Steel v. Smelting Co.*, 106 U. S. 447:

Ibid.

4. *Heath v. Wallace*, 138 U. S. 573:

In which the court held that the quality of the lands was a question of fact determinable by the land department, and the case *shows* there was a complete *actual* determination of the quality of the land after examination prior to the issuance of the patent.

5. *Scott v. Lockey Investment Co.*, 60 Fed. 34:

Here was in instance where a stranger sought to attack an argicultural patent on the ground that the land was known mineral land at the time of patent and there had been *an actual complete determination before patent that the land was agricultural.* As the court expressly says, the conveyance was made as agricultural, and that closed the incident so far as a stranger was concerned, and the patent in the case well shows the expression of quality, etc.

6. *Carter v. Thompson*, 65 F. 329, a case much cited by the defendants in the court below, was one of a mining title contesting with a prior townsite patent, one that had issued twenty years before. The court held and the record showed a complete finality in the land office prior to the issue of the earlier patent, and consequently was not subject to attack by a stranger.

7. *U. S. v. Winona*, 67 F. 948, it appeared that all the antecedent questions relating to railroad company under a land grant had been specifically passed on by the land department and that the adjudication of these questions was complete, and that while these decisions may be voidable they are not void. We surely have no quarrel with that case.

8. *Buena Vista Petroleum Co. v. Tulare Oil & Mining Co.*, 67 Fed. 226:

A state patent issued and thereafter defendants located the land on the ground that the land was mineral and it appeared from the record that the state had properly selected the land under a grant and that the selection had been approved by the secretary of the interior as required by law and that the certified list issued to the state was equivalent to a patent. There had been a complete actual determination and finality.

9. *U. S. v. Mackintosh*, 85 F. 333:

After a complete investigation the secretary formally decided that the lands were desert, and the court simply held such an *adjudication* could not be impeached in the manner sought.

10. *N. P. R. R. Co. v. Soderberg*, 86 F. 49 (affirmed 188 U. S.):

The court held the controverted land was mineral, being a granite quarry, and that it did not pass under the grant. That was the sole ground of decision.

11. *Cosmos Ex. Co. v. Gray Eagle Oil Co.*, 104 F. 20:

A decision that questions of fact which have been passed on and actually decided by the secretary of the interior are not reviewable by the courts, which proposition we cheerfully endorse. It is also the ruling in the cited case of *Catholic Bishop, etc. v. Gibbon*, 158 U. S. 155, which was a contest fought out from the local land office to the department of the interior.

We are frank to say we do not understand why counsel for the defendants should go to the trouble of gathering these authorities for us, as they all squarely uphold our position, as do the similar cited cases: *Neilson v. Champagne Co.*, 119 F. 123; *New Dunderberg v. Old*, 79 F. 598-607; *James v. Germania Iron Co.*, 107 F. 597-618, a case where there was complete hearing and determination of the land, and which determination the court held could not be collaterally attacked; *Janes v. Wilkinson*, 42 Pac. 737, which simply points out the rule that a merely voidable patent may not be attacked collaterally

by a stranger to the title; *King v. McAndrews*, 111 F. 860-874, another example of complete examination and determination previous to the issue of patent; *Noble v. Union River Logging Co.*, 147 U. S. 165, where it was simply held the *approval* for a right of way over public land under the Act of March 3, 1875, could not be attacked collaterally; *Hartman v. Warren*, 76 F. 157-164, in which case it had been determined by the land department that Warren was a Chippewa Indian, and the court only held this racial finding could not be impeached collaterally; *Deweese v. Reinhard*, 61 F. 777-781, on contest went through the local and general land offices and to the secretary of the interior, who rendered a final decision on a question of fact, and the court held this decision could not be attacked collaterally; and the same identical ruling was made in the remaining cited cases, namely:

Peabody, etc. v. Gold Hill, 111 F. 817;
Bear v. Luse, Fed. Cases 1179;
Oregon Trunk Co. v. Deschutes, 172 F. 738;
Lee v. Johnson, 116 U. S. 48;
Sparks v. Pierce, 115 U. S. 408;
Meader v. Norton, 11 Wall. 442;
Johnson v. Towsley, 13 *Id.* 72;
Silver v. Ladd, 7 *Id.* 219;
Warren v. Van Brunt, 19 *Id.* 646;
Moore v. Robbins, 6 *Otto* 530;

Shepley v. Cowan, 1 *Id.* 330;
Marquez v. Frisbie, 101 U. S. 475;
Bohall v. Dilla, 114 *Id.* 47;
Maxwell v. Land Grant, etc., 121 *Id.* 380;
Knight v. U. S. Land Assn., 142 *Id.* 161;
Monroe v. Becker, 147 *Id.* 47;
Duluth v. I. R. R. Co., 173 *Id.* 587;
In re Emblen, 184 *Id.* 660;
Manning v. S. J. Tin Co., 9 *F.* 727;
Campbell v. Weyerheuser, 161 *F.* 332.

It creates surprise that counsel should cite a multitude of inapplicable cases of attack collaterally on voidable patents by a stranger, issued after a complete examination and determination of the subject-matter by the land department of the quality of land of which the United States was solely the owner at the time of the issuance of the patent. None of the citations contravene, but all uphold, the rule of the *Barden* case! *Examination, actual determination and expression in the patent of the non-mineral quality of the land.* And *if the mineral exception be valid,* the cases cited could in no event affect this suit, even if all hostile, as in that event the legal title of the mineral land would *not pass* from the United States under the patent. None of the text book writers, not even Mr. Lindley, claim that the character of the land is determined by the *mere issuance* of a patent, un-

less it issued *"pursuant"* to the agricultural or mining laws, as the case may be, and Mr. Lindley, whose ever rallying point is the *Cowell-Lammers case*, and who overlooks entirely the only point in the *Gale-Best* case applying to this question of an excepted patent, observes at section 779 of his book:

"This rule (conclusiveness of patents, *i. e., Cowell v. Lammers*), when invoked in a certain line of cases, *seems to have lost some of its force, if it is not altogether ignored.* Take, for example, the case of a patent for a placer claim within the limits of which it is asserted that a lode exists whose existence was known at the time the placer patent was applied for, and which was not embraced within the placer location. The courts hold in such instances that the patent is not so conclusive that the land is placer in character as to prevent the owner of the known lode from defeating the operative force of such patent in *an action at law*, by showing the facts as to the existence of such lode and the knowledge thereof by the placer claimant."

In view of the recent decision of the California Supreme Court (June 6, 1911) in *Van Ness v. Rooney*, 160 Cal. 131, the reasoning of Mr. Lindley is shown to be utterly fallacious.

"So," he says, "with a townsite patent," etc., etc. The point of this section which was cited by the defendants in the courts below is that the very rule that the defendants contended for is, according to Lindley, *ignored* by the Supreme Court of the United States, as he was evidently referring to *Reynolds v. Iron-Silver Mining Co.*, 116 U. S., *and kindred cases.*

The concluding proposition urged by the defendants in the court below in this phase of the suit was that because it was not alleged that the patent issued in violation of any rule or regulation of the interior department or that the application of the railroad company did not comply with all laws and regulations in the subject, the suit must fail.

There is *no special demurrer* in the record and bill over and over charged that the patent issued without the jurisdiction of the land department and wholly without authority of law, etc. (Paragraph 17 of bill.) It is true, as stated by counsel, that the rules born July 9, 1894, expressly provided that lists prepared prior thereto should be excepted from their operation in instances where the said lists had been prepared in accordance with *any* rule, regulation or instruction of the secretary of the interior but as a matter of fact, and counsel will not deny it, the Madden application did not in any

way comply with the rules or regulations of the interior department in force at the time of the application which required proof of the non-mineral character of each 160 acres of land and simply saying "they were non-interdicted mineral lands" for if on such a record the validity of the patent is claimed it necessarily follows that the presumed "adjudication" which followed is a determination that on such a record the patent should issue, *the same is a conclusion of law* and not an adjudication or determination of a question of fact that is conclusive, but as a mere legal conclusion is subject to attack and to review in the courts, for as the Federal Supreme Court has said:

> "While the decision of that fact (of occupation and cultivation by a settler) may be conclusive as between the parties (to the contest in the land office), his ruling that occupation and cultivation created a claim exempting the land from the operation of the land grant is decision on a matter of law *which* does not conclude the parties and *is open to review in the courts.*"
>
> *N. P. R. R. Co. v. Colburn,* 164 U. S. 383.

In this connection we urge that if it be held that the ruling of the secretary of the interior was that an excepted patent issue, on the record before him, that it was a ruling of law not justified by the record and is subject to review by the court in this suit.

And in connection with the question of the mineral exception let us examine the land office case of *Courtright v. W. C. R. R. Co.*, 19 L. D. 410, relied on by defendants, where it was held that while the inclusion of the mineral exception was legal and lawful it did not confer on the department authority to make the necessary examination and determination after issue of the patent for when a patent issued, wrongfully or rightfully, the jurisdiction of the land department ceased, and the secretary went on to say:

> "The exception contained in the patent went beyond giving expression to the intent of the statute as construed by the Supreme Court, *and added a restriction upon the grant* which is not to be found in the granting act."

Just how a restriction on the grant was created by *excluding unknown mineral* lands is not apparent to the writer in view of the fact that such lands were precluded by the grant! Counsel did not argue the citation! This is the error into which Judge Ross fell and on which he based his decision in the court below. They simply submitted it without comment and passed on. A restriction on a grant cannot be created except in a manner pointed out in the Shaw-Kellogg case by Justice Brewer, and consists in *withholding*, for instance, *"unknown"* mineral lands when only "known" mineral lands

are precluded from the operation of the grant? We are convinced the very able counsel for the demurring defendants do not attach any particular importance to that particular land office decision, which distinctly says that the railroad title to the lands is *evidenced by the* grant *and* that a patent is unnecessary. If counsel will so agree and this court so hold this case might quickly and satisfactorily (to us) be disposed of.

In the court below combating the validity of the mineral exception and asserting that the patent was conclusive and that the court must assume every necessary required fact in order to uphold the patent, counsel made references to debates in congress concerning the joint resolution of June 28, 1870. It seems that the court reached the conclusion, from the portion of the debate furnished, that the joint resolution did not authorize of itself the insertion of the mineral exception and it is equally certain that the court did not reach its conclusion from the context of the law, but solely from the reading of the debate.

This appellant did not predicate his suit, in so far as the mineral exception is concerned on the joint resolution of June 28, 1870. His contention was, and is, that the exception was authorized by the grant and but gives expression to its intent. *The phase of his suit now under discussion* is based on the Act of

July 27, 1867, *and the rule in the Barden case requiring the insertion of the mineral exception in patents issued without examination or determination as to the quality of land embraced in the patent.*

Complainant, however, conscious of his limitations, asked for a construction of that resolution as the patent recited that a grant of lands was made to defendant railroad by and through *that joint* resolution and the granting act of July 27, 1866 of twenty sections of land per mile of road *independent of its mineral or non-mineral quality,* of odd numbered sections *within the limits* of twenty miles and if the land office construction that land to the aggregate of a definite number of sections *means double that number,* on either side of the track, *it would mean,* according to the language of our patent, twenty sections on either side of the track *within* the limits of twenty miles therefrom, which would be an impossibility as a limit of forty miles each way would be necessary to sustain the land office construction.

The land decisions cited in the portion of the congressional debate furnished by defendants in the court below was limited to instances of "actual settlers," but in addition to "actual settlers" and the saving of their rights, the resolution adds: *"Together with the other conditions and restrictions provided for in*

the 3d section of the Act of July 27, 1866," and that section, in addition to settlers, homesteaders and pre-emptors, whose rights are saved, *expressly saves the mineral land.* Now, what other condition or restriction is to be found in that section? And if no other can be found, must not the resolution necessarily be held to mean that the other conditions and restrictions refer to the *saving of the mineral lands?* Of course, we are aware that counsel will contend that nothing must be "assumed" against the railroad corporation, but counsel must remember that the mandatory rule of construction in these cases does not permit the court to "assume" in favor of the grantee. Otherwise, *there are no "other conditions and restrictions"* and the whole resolution is meaningless after the words *"actual settlers."* We think, however, that the court erred when it held that the "other conditions and restrictions" did not authorize a reservation of mineral lands, but that such exception should include likewise a similar exception of all lands reserved, sold, granted or otherwise appropriated, and all lands to which the United States did not have full title and which was not free from pre-emption or other claims or rights at the time the line of grantee's railroad was designated by a map filed in the office of the commissioner of the general land office.

It will be seen by referring to the "certificate of approval" (appendix

p. 456) that the land office did "expressly save" the mineral lands in controversy by *"excluding"* them from approval and from transfer under the patent about to be issued under the certificate.

The view of Judge Ross cannot be maintained for the reason that all claims, except mining claims, would be barred which did not exist at the time of filing of the map of definite location and for the further reason that all of such claims, *except mining claims,* would be standing of record *in the local land office at such date or would be barred,* while there was no provision of law that required *or permitted* the recordation of mining claims *in the local land office* and the right to make mining locations was a right, as pointed out in the *Barden* and *Sanders* cases, *that was reserved* out of the grant up to the *time of the patent*, even up to the day before any of these "unknown" claims, *could only be saved by the mineral exception,* and consequently it would not be necessary, as said by Judge Ross, to except all the other claims and rights in the patent *as they* would appear *in the records of the land office* and be brought to the attention of the secretary of the interior and would not require, saving in a patent that could not issue until after the map of definite *location was filed,* and consequently the writer thinks that under the joint resolution it was the duty of the secretary of the interior to cut out of the lands all pre-emption and

other claims of right appearing *of record in the local land office at the date of the filing of the map of definite location* and then the only remaining "condition" or "restrictions" to save were *known mineral claims and rights* which might be existing at the time of patent, and the unknown mineral lands could only be saved by the "exception of all mineral." Such was the contention and action of the department of the interior for forty years and the secretary of the interior is now following such construction. In no other way may force be given to the language of the joint resolution after the words "actual settlers," and the rule of construction of these matters as laid down in the *Soderburg-N. P. R. R. Co. case in* 188 *U. S.*, makes it necessary for the court to resolve all doubts against the railroad claimant and not, as counsel say, to assume and presume any and everything that may be necessary to save the grant to the railroad company.

It was the policy at that time, and had been for forty years previously, to insert reservations in patents! The right to do so had been recognized for nearly a half century *and it must be presumed that the lawmakers knew of such policy* and the sole purpose of the joint resolution was that the railroad company should not secure what in *law or in equity belonged to someone else*, the pilgrim of civilization, the actual settler, or prospector.

But suppose Judge Ross is right in his contention that if the joint resolution made it necessary or at least authorized the insertion of the mineral exception all other rights and claims should be reserved in the patent. *Well, why not?* Is there anything unreasonable or illegal or improper in such a suggestion? Is there any legal or moral reason why the patent should not carry all the conditions set forth in the joint resolution? The fact the patent at bar carried only the mineral exception proves nothing for patents were not issued to the Southern Pacific Railroad Company until many years *after* the filing of the map of definite location and of course the filing of the map of final location cut off all other claims, and the only remaining interest to be saved *was known and unknown mineral lands.*

Suppose that in face of an agricultural filing or mineral application for patent pending in the local land office patent should issue to the defendant railroad company? Of what avail would it be, excepted or unexcepted?

Nowhere in the opinion or in the debate furnished nor in the land office decisions cited below by counsel is there any intimation as to the particular method by which the rights of actual settlers could be saved and the "other restrictions and conditions" of the granting act saved and preserved. The "actual settler"

had a clear way marked out for him; he could prove his right and then the secretary could cut the land out of the granted area. The preemptor and homesteader, being holders of record of their respective lands, did not need any further protection than that accorded by the Act of July 27, 1866, while the "actual settler" referred to was without record protection. But suppose that instead of "securing the rights of actual settlers" by the method indicated he passed the entire area of every odd numbered section within the limit of twenty miles to patent, inserting therein the exception contained in the exact language of the joint resolution: "Excepting and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the 3rd section of the Act of July 27, 1866, including mineral lands, should any be found in such tract, except coal and iron lands. Suppose a patent should issue for land known to the secretary to be mineral but that the owner was content to stand on his location and discovery, would an exception in a patent to the defendant railroad company OF THAT PARTICULAR CLAIM be nugatory and would the patent be conclusive the mining claim did not exist? Instead of the claim being designated, the patent excepted "all known mineral lands" would not the mining claim be excepted? Now, how could the secretary save the other conditions and restrictions, i. e., UNKNOWN

MINERAL LANDS except by an EXCEPTION OF ALL MINERAL LANDS?

Will it be contended that such an exception would not give expression to the intent of the joint resolution?

So we submit there is no terrible possibility conjured up by the thought of the inclusion of all the conditions in the supposed exception, and it is apparent that the reasoning of Judge Ross flowed from his basic error that in some way the exception would *limit or diminish* the grant of July 27, 1866.

The joint resolution is set out in full at page 457 of the appendix, and upon reading it will be seen that it says:

> "It shall be the duty of said secretary of the interior to cause patents to be issued * * * expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act, approved July 27, 1866."

By a reference to the third section of the act referred to it will be seen that the other conditions and restrictions provided for read as follows:

> "Provided, f u r t h e r, that all mineral lands be and the "same are hereby excluded from the operation of this act, and "in lieu thereof, a like quantity of unoccupied and unappropriated agricultural lands in odd numbered sections adjacent to

the land of said railroad, and within twenty miles thereof may be selected as above provided."

That is the only other condition or restriction appearing in addition to the reservation and saving of all the rights of actual settlers.

A sharp controversy arises between the complainant and defendants as to the meaning of this phrase, and as to its grammatical construction, the complainant contending that the adverb *"expressly"* modifies the words "saving and reserving" and the adverbial phrase "saving and reserving" modified the word "patents."

The defendants evidently appreciating the force of this contention makes a sharp attempted distinction, and on page 152 of their brief said, "The term 'expressly' *refers to the joint resolution, not the patent,* but it is upon the term 'expressly' that complainant relies; but even in that respect the conclusions of complainant would not follow for 'expressly' would mean by metes and bounds, areas definitely ascertained, not a general, indefinite, uncertain exception."

No authority, grammatical or otherwise, is advanced by the defendants for such extraordinary construction and to our mind it is based solely upon the

necessities of the occasion. We contend that under no form of construction can it be accurately contended that the word *"expressly"* refers to the joint resolution and *not to the patent.* And if it be admitted, as we think it must be, that the only proper construction of this statute is to hold that the term "expressly" refers to the patent and not to the joint resolution as contended by the defendant, it necessarily follows that it was the duty and it is the law that patents should issue containing an exception of the other restrictions and conditions provided for in the third section of the granting act and that condition solely is, that mineral lands shall be excluded from the operation of the grant and shall be saved by exception and reservation in the patent. The defendant railroad company at every point is forced into an unnatural construction for it must be evident that the secretary could not "expressly save in the joint resolution," he could only "expressly save in the patent," and just how the secretary was "expressly" to do anything in regard to the joint resolution except to obey its terms and to carry its terms into the patent is not apparent.

If, as contended by counsel, that the term "expressly" refers to the joint resolution it is evident that it would be impossible for the secretary of the interior to expressly or otherwise save and reserve the mineral

rights referred to in the 3rd section of the granting act. If the word "expressly" refers as we contend to the patent, it is clear that it authorized in obedience of the granting act the inclusion of an exception of unknown mineral lands or mineral rights, not then known to the secretary of the interior, in the patent.

This is evident because of the fact which must be admitted by the defendant that, at the time of the *issuance of the patent* it would be impossible for the secretary of the interior to have any knowledge of the character of lands that might be mineral that were to be included in the patent, as he could have no constructive knowledge of the existence or non-existence of mineral lands in the lands granted under the Act of June 27, 1866, except as he was bound to know by the recordation, until he had had an opportunity to investigate the condition and the character of the lands lying within the primary limits of the railroad land grant. He could and did have actual knowledge *of the rights of settlers* existing at the time of patent, for the record of those settlers' rights must have appeared in the local land offices at the time of the filing of the map of definite location, and unless they appeared there at that time those rights would have been lost and, under the granting act, the lands occupied by actual settlers who had not made application for the purchase in the local land

offices would have passed, under the terms of the grant, finally and forever to the railroad company, but, under the provisions of the various mining acts it would be impossible for those rights to appear of record in the local land office until such time as the applicant for purchase had appeared there, and in proper proceedings initiated his application for a patent to the lands which he might have held even prior to the passage of the railroad grant act many years before, and, furthermore, there is no law and there never has been a law requiring a mining locator to make an application for a patent, and until, for reasons of policy or otherwise, he had made such application, no record of his mining location or of his mining rights could have been filed or appeared in the local land office, and, in closing the discussion relating the question of the validity of the mineral exception it will be opportune to discuss, in detail, the opinion of Judge Ross in the *Roberts* case, which, as he stated in his memorandum (appendix, p. 445) contained his reasons for sustaining the demurrer in this suit.

Analysis of the opinion of Judge Ross.

1. It will be noted the opinion was rendered in the suit of *Roberts v. S. P. R. R. Co.*, and not in this suit and the opening remark that the pleadings are filled with irrelevant and redundant matter refers solely to the

Roberts suit; in that suit there was a general demurrer, a special demurrer with many items and a motion to strike with fifty-two items, while in this suit there is only a general demurrer.

2. In the second paragraph Judge Ross points out that the *Roberts* bill of complaint specifically allegel that the *legal title passed* under the patent while we allege in our bill of complaint that it did not and the *Roberts bill* asked the court to protest their alleged rights as such mineral locators, by some sort of injunctive process, by "controlling" the patent which was issued by the government and which they expressly alleged *conveyed the legal title to the land to the grantee named therein.*" Ours was a simple suit to quiet title under the added jurisdiction conferred in the federal courts under section 738 of the California Code of Civil Procedure with averments essential to a direct attack under which a person in or out of possession may institute his action to determine claims concerning real property against a person in or out of possession of the lands and the equity rule in the federal court was satisfied in this instance by reason of the fact that the defendants *were not in possession* of any part of the controverted lands at the time of our entry or at the time of the filing of this suit.

Neither did we seek "some sort of injunctive process" or did we seek

to "control" a patent "that passed the legal title" and consequently the opinion of Judge Ross in such particulars refers not to us but to the unfortunate Roberts suit which was heard at our argument and, which it appears, involved us in its confusion and misdirection.

Following such statement Judge Ross said:

> "* * * Neither the government, nor any one in privity with the government title, is here complaining. The suit is by strangers to that title, *for by* the express averments of the bill, the complainants of the bill, the complainants' alleged rights were not initiated until years after the issuance of the patent *which they expressly allege conveyed* to the railroad conveyed *the legal title to the lands.*"

Roberts simply stood on the mineral exception; he did not allege a prior segregation of the land he claimed by reason of previous recorded mining locations.

We have no contest with Judge Ross concerning the correctness of such a rule but the misfortune is, and his error was, that he made that ruling the basis of his decision in this suit in which *it is expressly and repeatedly alleged* that the legal title to the lands *remained in the United States* under every aspect of our suit, and we are necessarily constrained to believe that Judge Ross assumed our suit was

identical with the Roberts suit which it resembled in *not* one single instance or allegation!

And using the foregoing as his *predicate* Judge Ross goes on to say:

> "That the complainants cannot be heard to complain of the alleged frauds upon the government is so thoroughly settled by decisions so numerous as to make their citation unnecessary. They must be familiar to all lawyers at all acquainted with the law in respect to the public lands.
>
> "*The only* real question, therefore, in the case is whether the lands in suit are excluded from the patent by reason of the alleged subsequent discovery of mineral their by (Roberts) complainants under the exception clause inserted in the patent."

We admit, without reservation, that the reasoning of Judge Ross so far as he passed on the Roberts suit in such regard was absolutely right and have so contended. The Roberts suit was *based* on the proposition that while the legal title passed to the railroad company under its patent, nevertheless, a subsequent mineral location would have a retroactive effect and would defeat the grant and the patent which in the same breath they alleged passed the legal title! Judge Ross might have rested at this point but in seeking for grounds to destroy in every instance the effect of the mineral exception he fell into divers error, and it is evident that ever in his subsequent citation he had ever in mind the

case of a stranger seeking to "cancel" or "control" a *legal title* by reason of a subsequent trespass on lands to which they were in no way privy, and to which the legal title had passed away from the United States.

Judge Ross then proceeded to say:

> "Where did the officers of the government, charged with the duty of issuing patents for lands granted by congress get authority to cast upon the courts or juries the duty or power of ascertaining and determining the character of the public lands applied for under the grant, which congress devolved upon the land department *as a prerequisite* to the issuance of a patent therefor? The statutes of the United States will be searched in vain for any such authority, unless it can be deduced from the joint resolution of congress of June 28, 1870."

It may be said at this point that the Supreme Court of the state of California in many instances, and at the time when Judge Ross was a member of that court, held that such duty was cast on courts by reason of the law and the fact and Judge Ross in his own independent language in *McLaughlin v. Heid,* 63 Cal. 208, said this particular *mineral exception* was a part of the description and that a subsequent mining locator by making a discovery of mineral could thus avoid the grant and patent, and that such duty may be cast upon the courts has been so de-

cided by this court as elsewhere pointed out in this brief.

Then Judge Ross devoted some space to the history of the Southern Pacific Railroad Company and passing on *no* question except the validity of the insertion of the mineral exception proceeded to fully discuss from his viewpoint the effect of the joint resolution of congress of June 28, 1870. Previously herein we have fully presented our views concerning the said joint resolution and leave it without further comment.

Coming down to the *Barden* case, Judge Ross said, after citing therefrom:

> "The observation that 'the government cannot be reasonably expected to issue its patent, and is not authorized to do so, without excepting mineral land, until it has had an opportunity to have the country, or that part of it for which a patent is sought, sufficiently explored to justify its declaration in the patent' is very far from saying, much less deciding, that a patent issued for lands in pursuance of such a grant must or may except from the land described in the granting clause thereof, all mineral lands."

We are keenly conscious at this point of the poverty of the English language but at that we will continue to assert that when this court says that the United States

is not *authorized* to issue a patent for unexplored and undetermined land, without excepting mineral lands, *that it must be apparent that it is legal for the United States to insert such a mineral exception in a patent issued in such instance.* No other meaning may be extracted from the language. It is incapable of any other construction and Judge Ross necessarily was forced to say:

> "The court *could not* so have decided in that case, for there was no such question before the court, and could not have been, as no patent had been issued in the case thereunder consideration."

Heretofore in this brief we have shown that the questions of patent form, issuance and finality were fully before the court and such fact has been recognized in more than fifty subsequent cases in which the *Barden* decision has been cited.

And then Judge Ross even while claiming that the reference in the *Barden* case to patents was *obiter dictum* went on to cite many pages of the *Barden* case solely relating to the effect and force of patents and setting forth the lengthy citations in that case to the *Kemp case*, the *Steele case*, the *Heath-Wallace case*, the *Valentine land office case*, all of which *were confined to a discussion of patents*, closes the citation of the *Barden* case with this reference to a portion of the same relating to the force of a patent:

"Until such patent is issued, *defining the character of the land* granted and *showing it is non-mineral, it will not comply with the act of congress* in which the grant before us was made to plaintiff. The grant, even when all the acts required of the grantees are performed, only passes a title to non-mineral land; but a patent issued *in proper form upon* a judgment rendered *after due examination* of the subject by officers of the land department charged with preparation and issue, *that the lands were not mineral,* would, unless set aside and annulled by direct proceedings, estop the government from contending to the controversy and as we have already said, *in the absence of fraud* in the officers of the government, would be conclusive in subsequent proceedings respecting the title."

It must be apparent to this court that Judge Ross entirely overlooked the fact that the patent contained *no* jurisdictional recitals or any statement "defining the character of the land, showing it was non-mineral" and had in mind a perfect patent burdened with a mineral exception.

Is there such a perfect patent to be found in this suit?

Judge Ross then said:

"I do not find in this language of the prevailing opinion in the *Barden* case any support for the contention of complainants' counsel that the officers of the land department were required or authorized to insert in the patent here in question

or in any other similar patent, after describing the lands falling within the railroad grant a clause 'excluding,' etc. And that the Supreme Court itself takes the same view of the decision in the *Barden* case, is, I think, shown by its reference thereto in the case of *Shaw v. Kellogg*, 170 U. S. 313, when at page 339 it says."

Before taking up the *Shaw-Kellogg* citation it will be noted by this court (1) that the patent in the Roberts case is the one under consideration here, the lands being different in description only, and (2) that Judge Ross nowhere in his opinion alludes to the necessity of including in the patent a statement of the quality of the land in order to make the patent conclusive and (3) that he cites the *Shaw-Kellogg case* as authority for what a patent should not contain, although no patent was under consideration in that case and although the granting act passed on in that case *passed* to the title directly by the grantees *and did not provide for a patent!* It is only when a patent is provided for in grants *in praesenti* that the legal title remains in the United States; when no patent is provided for as in the case of *Shaw-Kellogg*, the legal title passes *in praesenti*.

The *only question* decided in the *Shaw-Kellogg* was that *after final examination and adjudication of the quality of land* by the tribunal vested by congress with

authority to pass on that question, *and over which the courts had no jurisdiction to revise,* the grant of the same could not be defeated by a *subsequent discovery* of mineral—that after such examination and adjudication, in an instance where a patent was not authorized, it was unlawful to make any notation on the records of the land department that might subsequently affect the title, all of which is admitted by us.

Long after the title passed to the grantees indicated in the act passed on in the *Shaw-Kellogg case,* and after repeated detailed examination of the land granted, which as Mr. Justice Brewer pointed was limited to lands which did not contain *known mineral lands,* and that the grant as a *whole* must be entirely *free* from all *known* mineral lands, after complete and formal decision by the land office that the land was not mineral and after it had passed away from the original grantee an attempt was made to defeat the *grant* by showing a subsequent discovery of mineral *before the issuance of a patent,* the subsequent locator claiming that under the *Barden* case a location under the mining laws of the United States could be made at any time subsequent to the grant *and up to the issuance of a patent* but this court met that contention by pointing out that under the so-called Baca grant there was no provision for a patent *and that the legal title passed under the grant!* and that the right to

make a mining location ceased when the surveyor general and the land department *finally* determined the land was non-mineral and consequently a *subsequent* mineral discovery would not defeat the *final* action or determinal of the proper tribunal that the land was not mineral. The subsequent locators claimed that a mining location could be made, as said in the *Barden* case, at any time up to the issuance of a patent and claiming that there could be no "finality of determination of the quality of the land until a patent issued defining the quality of the land" claimed, that a mineral discovery made after the action of the surveyor general and land department and up to the time the patent issued would defeat the Baca grant, but this court decided that a patent not being authorized by the Baca grant the claim was untenable as the action of the surveyor general and the land department in determining the quality of the land was equivalent to a patent and that a discovery of mineral subsequent to that time would not defeat the grant and that a notation on the plat to the effect that all mineral lands were to be excepted was nugatory *because* after full and complete examination it had *finally* and actually decided that the *lands as a whole* were wholly agricultural and not mineral and that formal adjudication ended the matter!

The citation made by Judge Ross to the *Shaw-Kellogg* case was of

that portion of the opinion which *(referring to a patent)* cites the *Barden* case as saying:

> "But there was no decision of opinion as to the question when the legal title did pass—and it passed unquestionably by the patent—it passed free from the contingency of future discovery of minerals."

All of which is very true but in connection therewith it must be noted that Mr. Justice Field and his assenting colleagues were referring to and had in mind a perfect patent founded on a perfect record—a patent issued after examination and adjudication with a statement of the quality of the land, a *patent with proper recitals* and not a patent, without record, statement or recitals like the one standing at the bar of this court.

Then Judge Ross said:

> "I am also of the opinion that the case last referred to— *Shaw v. Kellogg*— is direct authority for the proposition that the officers of the land department had no authority to insert in the patents under consideration the clause excepting from the lands described in its granting clause 'all mineral lands, should any such be found in the tracts aforesaid.'"

The grant involved in *Shaw v. Kellogg* was made by section 6 of an act of congress passed *June* 21, 1860, (12 *Stats.* 71), in settlement of a claim under a Mexican grant

to land in the vicinity of Los Vegas by which the claimants were given an equal amount of non-mineral and vacant land to be by them elsewhere selected in the territory of New Mexico, to be located in a certain form and within a certain time. It was by the act made the duty of the surveyor general of New Mexico to make survey and location of the land so selected and the courts could exercise no jurisdiction in the matter. The grantees made their selection and applied for the land. Certain correspondence occurred between the land department and the surveyor general in respect to the form of the application and in respect to the evidence relating to the character of the land, that is to say, whether or not it was mineral land, which resulted in the land department instructing the surveyor general to approve the selection and make a survey thereof. *The land department subsequently approved the survey, field-notes and plat of the surveyor general, but in doing so added the words, "Subject to the conditions and provisions of section 6 of the act of congress approved June 21, 1860,"* which, as has been seen, excluded mineral land from the grant. *The act of congress did not provide for the issuance of a patent,* but the land department noted on *its maps that this tract had* been segregated from the public domain and had become private property and so reported to congress, which never questioned the validity of such action. The

grantees were also notified and took possession of the land.

Many years afterwards a portion of it was claimed as mineral land by a party whose contentions were thus stated by the Supreme Court in its opinion:

> "These contentions are that congress granted only non-mineral lands; that this particular tract is mineral land, and therefore by the terms of the act is not within the grant; *that no patent has ever been issued,* and therefore the legal *title has never passed* from the government; that the land department never adjudicated that this was non-mineral land, but on the contrary simply approved the location, subject to the conditions and provisions of the act of congress, thereby leaving the question of title to rest in perpetual abeyance upon possible future discoveries of mineral within the tract."

It will be noted at this point that this portion of the Shaw-Kellogg opinion is simply a statement of the claims of the subsequent discoveries of mineral who evidently overlooked the fact that the title in that case passed by grant and *not* by patent.

In considering the limitation undertaken to be imposed by the land department upon its approval of the selection of the land by the grantees and the surveyor general's survey, field-notes and plat thereof, the Supreme Court said:

"What is the significance of, and what effect can be given to the clause inserted in the certificate of approval of the plat that it was subject to the conditions and provisions of the act of congress? We are of the opinion that the insertion of any such stipulation *and limitation* was beyond the power of the land department. Its duty was to decide and not to refuse to execute the will of congress. It could not deal with the land as an owner and prescribe the conditions upon which title might be transferred. It was agent and not principal. Congress had made a grant, authorized a selection within three years, and directed the surveyor general to make survey and location, and within the general powers of the land department it was its duty to see that such grant was carried into effect and that a full title to the proper land was made. Undoubtedly it could refuse to approve a location on the ground that the land was mineral. It was its duty to decide the question—a duty which it could not avoid or evade. It could not say to the locator that it approved the location provided no mineral should ever thereafter be discovered and disapproved it if mineral were discovered; in other words, that the locator must take the chances of future discovery of minerals. It was a question for its action and its action at the time. *The general statutes of congress in respect to homestead, pre-emption and townsite locations provide that they shall be made upon lands that are non-mineral, and in approving any such entry and issuing a patent therefor could it be tolerated for a moment that the land department might limit the grant and qualify the title by a stipulation that if thereafter mineral should be discovered the title*

should fail? The Baca grant was similar to pre-emption, homestead and townsite locations in that the land as a *whole* must be non-mineral and *known* mineral in any part of the land avoided the grant, there being no lieu provisions. Before any title could vest in the Baca claimant or in a homestead, pre-emption or townsite claimant it had to be determined by the proper tribunal that the land was "not known" to be mineral at any time up to the time of final proof and when the matter was actually determined by the proper tribunal it was determined for all time, but this court has never disputed that an exception give the proprietor of a *mineral* vein the right to follow his vein into the patented homestead land, to burrow underground into the land embraced within the homestead patent was valid! and that, too, in face of the fact that a homestead patent carries title to the center of the earth. The distinction is obvious. The subject to be determined in this class of cases was the "known" mineral quality of the land at or before time of patent and as pointed out in the *Barden* case the rule applied in the *Deffebach-Hawke* and *Davis-Weibbold* cases do not apply to cases arising under railroad land grants and the rule that must be applied in railroad land grant cases is laid down in the *Barden* case and the fact is pointed out in the *Shaw-Kellogg* case in reference to the statement of the quality of the land to be inserted in a patent issuing under a railroad land grant. Mr. Justice Brewer grouped about the Baca grant the similar grants in homesteads, pre-emption and townsite grants which only preclude *"known"* mineral lands from their operation. He did not include or

refer to railroad land grants in illustrating his statement that such grants could not be limited or diminished by future discoveries of mineral, or by excepting the patent in those cases with a provision excluding all mineral land from their operation. It cannot in that way avoid the responsibility of *deciding* and giving to the party seeking to make the entry a full title to the land or else denying it altogether. As said in *Deffebach v. Hawke, supra,* 406:

"'The position that the patent to the plaintiff should have contained a reservation excluding from its operation all building and improvements not belonging to him, and all rights necessary or proper to the possession and enjoyment of the same, has no support in any legislation of congress. The land officers, who are merely agents of the law, had no authority to insert in the *patent any other terms than those of conveyance, with recitals showing a compliance with the law and the conditions which it prescribed.*'"

The court will notice what was probably one of the ideas that controlled the decision of Judge Ross, namely, this extract from the *Shaw-Kellogg* case:

"The general statutes of congress in respect to *homestead, preemption* and townsite locations provide that they shall be made on lands that are nonmineral, and in *approving* any such entry and issuing a patent therefor could it be tolerated for the moment that the land department *might limit the grant* and qualify the title

by a stipulation that if thereafter mineral should be discovered the title should fail."

In answer it will be seen:

1. The court speaks of an antecedent *approval* of the entry.

2. That the rule referring to townsite cases, like the *Deffebach-Hawke* and *Davis-Weibbold* cases have no application to cases arising under the railroad land grants—that is clearly stated and stated positively and without reservation in the *Barden* case: the first excluding the entire entry if not *wholly* non-mineral and the latter only excluding mineral legal subdivisions. This court will remember that there no "lieu land" provisions in the cases of homestead, pre-emption and townsite cases and the land as a *whole* must be non-mineral!

3. The homestead and pre-emption laws gave a citizen the right to take up lands *not known* to be mineral at the date of entry.

4. The railroad land *grants* act of July 27, 1866, granted land *in praesenti* but excluded *known* and *unknown* mineral lands.

5. While a mineral exception in a homestead, pre-emption or townsite patent would be void *as it would create a limitation* of *known* mineral lands and thus limit the

patent to that extent, the same mineral exception in a railroad land grant patent *would not limit the grant* as evidenced by the patent as both *known* and *unknown* mineral lands were precluded from the operation of the grant and consequently an exception of "all mineral lands," known or unknown, *would not limit the grant* and simply gives expression to the intent of the statute, and in any event, it will be impossible to say, in any aspect of the case, that the mineral exception in a railroad land grant patent, diminishes or limits the grant under which it issued. Amongst other differences it appears that if mineral be found in any part of a homestead the whole of the homestead would be lost as Mr. Justice Brewer points out was the case in the Baca grant, while under a railroad land grant *nothing* would be lost to the railroad grantee—only the legal subdivision on which mineral was discovered would pass from the grant and a *like* lieu amount could be taken up elsewhere and consequently with the *lieu* lands at hand it would be simply impossible to *limit* or diminish the grant as under no circumstances was the defendant entitled to known or unknown mineral lands. There is not a single theory that will support the proposition of Judge Ross that the mineral exception could under any state of facts or under any conditions diminish or limit the grant and it necessarily follows that Judge Ross has no support for his conclusions. It must be

quite clear that this court did not have a railroad land grant patent in mind when the *Shaw-Kellogg opinion* was written about the Baca grant. The only reference by court or counsel in that case to a railroad land grant patent was when counsel contending for the mineral locators urged that until a patent issued, and that a patent must be issued under the Baca grant, mineral location could be made but the contention fell when this court held the title passed by the Baca grant and that there was in law no provision for a patent.

The court will observe how Judge Ross fell into error in assuming that the mineral exception of known and unknown mineral lands in the patent could possibly limit the grant that expressly precluded such lands from its operation.

Again the *Deffebach-Hawke* citation is equally misleading and fallacious.

The citation reads (*and is cited against us*):

> "The position that the patent to the plaintiff should have contained a reservation excluding from its operation *all buildings and improvements,* not belonging to him and *all rights* necessary or proper to the possession and enjoyment of the same has no support in any legislation of congress —the land officers who are merely agents of the law, had no authority to insert in the patent any other terms than those of conveyance, *with recitals showing a compliance*

with the law and the conditions which it prescribed."

It will be observed:

1. The decision was made many years before the *Barden* decision and is fully distinguished in that case.

2. The opinion *Deffebach v. Hawke* says that patent *must carry full recitals* showing compliance with the law, and it will not be contended that this patent carries the necessary recitals.

3. That was a case where a placer locator had received a patent from the United States to land on which a townsite had been placed; the matter had been fought out in the land department and it was decided the placer locator was entitled to a patent and accordingly a patent issued which, under the placer mining law, carried full title *to all the surface* of the land *embraced* within the patent boundaries down to the center of the earth and the claim of the townsite claimant that buildings, building locations, streets, block and alleys and all rights relating to the possession of the same, etc., should be reserved for him and be taken away from the placer location is so utterly absurd that we were quite confident counsel will not cite it again as an authority against us.

Concerning these intertwined certified questions counsel cast various anchors to the windward in fretful hope that at least one of them would drag. For instance, counsel said: "In no instance has it been held that a mineral location deprives the land department of the jurisdiction to determine whether the land covered by such location is in fact mineral and whether in fact mineral has been discovered in sufficient quantity and character to justify its development and exploitation," but such investigation may only be had *upon a hearing and notice to the mining locator.*

We do question the elementary proposition advanced by counsel of the right of the department to *hear and determine all and any contests* relating to the public lands but we do claim there must be a hearing and determination in an *ex parte* proceeding resulting in a decision before a valid patent may issue in such premises, and the fact remains that the land is admittedly mineral and was known mineral land at time of the patent and has been examined BY THE LAND DEPARTMENT and determined to be mineral land of great value.

Then counsel said that while it was not contended that equitable rights may summarily be ignored, that congress can deal with the public lands of the United States as it sees fit. May be so, *but it cannot take away an*

unpatented, perfected mining location from the locator! While it may grant lands on conditions to be performed, *after the conditions are performed* it may not destroy the mining title. While a repeal of the homestead law might destroy unperfected homestead applications *the repeal of all the mining laws would in no way affect an unpatented perfected mining claim* any more than would the attempted sale, without notice, contest, hearing and determination of claimed and located mineral land to some predatory, agricultural railroad claimant, and neither would it be necessary for that mining locator, in case of either event, to find it necessary to impress on someone a trust affecting the violation of the law. He may ignore the patent and rest on his rights.

An action to enforce a trust, as vaguely intimated by counsel, *may be only* maintained in instances when the patent attacked by the antecedent claimant, *issued erroneously within the jurisdiction of the land department* and does not apply to void patents *issued without such jurisdiction* or to patents that do not carry the legal title. Counsel keep on forgetting the distinction, which is elementary.

(Gold Hill M. Co., v. Ish, 5 *Ore.* 104.*)*

Counsel then said: "If the ruling (known mineral lands) in placer cases were applicable to all land grants (for all land

grants except mineral) every patent, whether for homestead, pre-emption or school land, would carry with it an uncertain and indefinite exception of mineral land, with a corresponding invitation to contention and litigation, but the rule as to patents is, as we shall see later, directly to the contrary," and then a strenuous struggle follows to uphold the proposition which we have seen has been specifically repudiated in *saline, land grant, homestead, pre-emption, townsite and all other classes of patents,* and all the cases cited by counsel are simply a reiteration of those instances when prior to the issue of the patent there had been, in fact, a complete adjudication of the fact and the *patent had issued within the jurisdiction of the land department.*

Speaking of the *Sanders case,* 166 U. S. 620, counsel said the case is authority for the proposition that if the *mining claim has not* been filed in land office until after the railroad definite route map had been filed, the claim was not valid, which is untrue, as the case specifically stated that the right to make mining locations up to the issuance of the patent is the *one right reserved out of the grant* and then counsel make the absurd claim that the non-filing of such mining claim in the land office *prior* to the filing of the map of *definite location* operated to *deprive* the land department of its jurisdiction to determine whether the land is of the character

contemplated by the grant and this contention is made in the presence of the *Barden* and *Sanders* cases! What the *Sanders case* did hold about such an antecedent claim was that such a claim, a mining location on agricultural land, *even if invalid,* and so confessed, was nevertheless a "claim" that excluded the claim from the grant! A ruling from the land office is cited *(N. P. R. R. Co. v. Allen, 27 L. D. 286)* in which it was said:

> "A *careful examination* of the Sanders case seems to show that to except NON-MINERAL GROUND from the grant by reason of a claim thereto under the mining laws, the claim must have been one which has been asserted before the local land office and is pending of record there at the time the line of the road is definitely fixed," etc.

The distinction is obvious—a mining claim placed on *"non-mineral" land* in order to have segregated the land under *an invalid claim* must have been pending, etc. Will counsel *tell us how the successful mining location on which the Barden case is based was valid in view* of the fact that the mining location was not *made* until years after *the map of definite location was filed,* and that it never appeared in the land office? Or what becomes of the specific ruling in the *Barden* and *Sanders* cases *that the right to make a mining location on mineral land was the single right existing after the filing* of the map of definite location! How could the mining loca-

tion or the application in the *Barden* case have appeared in the local land office at the time of the filing of *the map of definite location* when the same was not made until years after the *map of definite location was filed?* Surely, counsel may not be serious in such contention but in the presence of the *Barden and Sanders cases* they asserted:

"It is not alleged nor claimed in the present case that there were any mineral locations of record in the land office affecting any of the land in suit at the time the Southern Pacific Railroad Company's map of definite route was filed in the general land office. It appears, on the contrary, that the prior mineral locations upon which complainant relies were not even made on the land until long after the company's map of definite route was filed and it is not alleged that such prior locators ever made any application to purchase the land from the government or even made any entry whatever in the United States land office." All of which was absolutely unnecessary.

4. Counsel then said it had been repeatedly held that a patent when issued is conclusive that the land was not known to contain any known mineral land, but we say the *"adjudication"* by patent is not conclusive in any event unless the fact had been *actually determined* and counsel saying there is a host of cases so holding only cited one, *Johnson v. Drew,* 171 U. S. 93, which *only holds,* as we have all along contended, that the *"judgment"* of the land

department *deciding* that the land was agricultural, saline, mineral *or not, presented a question of fact,* NOT RESTING on record, DEPENDENT *on oral* testimony, and that the *decision* of the land department *one way or the other* was conclusive. Of course! Suppose that not dependent on the record, but on oral testimony, uncontradicted testimony, the secretary should write a formal decision holding the land *to be mineral* and denying the application for a patent, *thereupon* issued the *patent at bar,* will it be contended that on such a record a patent *so issued* and written would create the conclusive presumption that the land was agricultural, that no mineral lands were known to exist, and that it carried the title and was not void?

Such is this case plus the exception! Of course, Mr. Lindley asserts, apparently but vaguely, to the contrary, but says the *rule is involved in confusion* and doubt. He admits that placer and townsite patents may be attacked but in regard to agricultural lands he takes the position:

> "that the only way to avoid the same in a bill in equity and that one owning a mining claim which, if *non-mineral,* would inure to a railroad company under a congressional grant, *cannot at law* attack a patent issued to such company by showing that the land embraced within the mining claim was mineral in character at the time of the railroad patent. The aid of the government must be invoked to vacate such a patent, *and until it is vacated*

it is a conclusive adjudication that the lands are non-mineral. A similar rule applies to agricultural patents. The owner of a 'known mine' within premises patented as agricultural cannot defend in an action *at law against such a patent.* The method of obtaining relief is the same as in the cases of railroad patents—a suit brought by the United States to set the patent aside."

The recent Van Ness-Rooney case (supra) absolutely disposes of this contention in every single particular.

The action in that case was instituted by a placer locator to quiet his title against a subsequent grantee of the S. P. R. R. Co. of land patented to that company under the land grant act *and the patent was held absolutely void.*

If this *Lindley rule* is true, what becomes of the many cases, the host of California and federal cases and iterated and reiterated contentions of counsel that in a private suit a prior mining locator could charge the fraudulent patentee as a trustee? In that instance, to start with, Lindley is *in apparent error.* In California, in defending an action of ejectment brought against him by the patentee he could maintain his *equitable defenses* and impeach the patent without the aid or suit of the United States!

Mr. Lindley is without state or federal authority in his view of the law; the text is suggestive of hasty determination and no authority is produced by the text writer to uphold his *own views*. What was the *Morton-Nebraska case* (21 Wall. 660)? There a patent had issued to an agricultural claimant for known mineral (saline) lands; and the patent fell! Fell in a suit instituted not by the United States, but by a private citizen. What has become of the rule of *Alford v. Barnum, Steele v. Hunt, Merril v. Dixon, Garrard v. Silver Peaks Mining Co., Hermocella v. Hubbell, Cole v. Best, McLaughlin v. Powell, Chi. Q. M. & M. Co. v. Oliver, S. P. R. R. Co. v. McCusker, Wright v. Roseberry, Van Ness v. Romey?* What becomes of this proposition: "The *public faith has become pledged to him and any subsequent grant of the same lands to another party is void* unless the *first location* or entry be vacated and set aside." Such was the general proposition argued or stated by the Federal Supreme Court in the case of *Wirth v. Branson*, 98 U. S. 118. It applies aptly to this location and suit. *Mr. Lindley* says, and he is the sole reliance of counsel, that an agricultural patent to a railroad company under a grant excluding mineral cannot be avoided by a prior mineral locator and the patent is not void! Well, let us go a step farther. Suppose that at the date of mineral location there was *pending in*

the general land office an application by a mineral locator to purchase the land and pending the application a *railroad grant patent issued?* Would the patent be conclusive as to the *non-mineral* character of the land? Yes, says Mr. Lindley. Counsel cannot say "Yes" because they have contended to the contrary from the commencement of this suit. Suppose the application was approved and a mineral patent issued to the locator and subsequently the railroad secured a patent! Could the mining patentee attack? No, says Mr. Lindley, but counsel have not expressed themselves on this subject. Then in the *Sanders case,* 166 U. S. 620, the Supreme Court said that even an *invalid mining claim made on agricultural ground* segregated the land from the public domain and it could not pass under the grant and it *naturally follows that a valid mining claim on mineral ground* would cut the land out of the grant, as said in *Barden and Sanders cases,* and while the location remained *uncancelled* the land could not pass to patent in the absence of notice, hearing and contest—examination and actual determination in which event the patent would be conclusive for all time against collateral attack, if issued in proper form.

Take the case of *Newhall v. Sanger,* 92 U. S. 761, which counsel said was "a direct attack." Land within the boundaries of an alleged Mexican grant which at the

time of the grant was *subjudici,* but which was afterwards held not to be a valid claim against the United States, and it was held it did not pass by patent to the railroad company and the claim was not pending in the local land office at the date of the map of definite route and a subsequent pre-emption patent *was held absolutely void,* and in this connection there is no difference between the patent and this patent as they were both issued in contravention of law.

The same rule was maintained in *Doolan v. Carr,* 125 U. S. 618, and while they were not mineral cases they are on a parity as they concerned lands which, like mineral lands, *were forbidden to pass under the railroad land grants,* and either being issued in "known" contravention of law would be void. In *Gregory v. Pershbaker,* 73 Cal. 117, we find the converse of our proposition. Of course, a patent for mineral land can only issue under the act of congress relating to the disposition of mineral lands *"on proof they are such."* The same rule excluded a *millsite* from mineral land is upheld in *Cleary v. Skiffich,* 28 Colo. 368, which is the converse of our case.

Of course, we admit, as pointed out in *Paterson v. Ogden,* 141 Cal. 43, that when an agricultural applicant (or any other applicant) has made application for a patent *and of which public notice was* given that all

parties would be bound to take notice thereof and that after such application, public notice, hearing and actual determination in accordance with the proofs that the patent issued in proper form would be conclusive. That is probably what Mr. Lindley intended to say! Such was the rule of *Saunders v. La Purisima*, 125 Cal. 159, but that case modified the rule by saying the mineral exception, in any event, destroyed the conclusive character of the patent. That is also the rule in *Richards v. Wolfling*, 98 Cal. 195, as to conclusiveness after contest, proofs, etc., and judgment, but not otherwise. So *it* is in *Hermocilla v. Hubbell*, 89 Cal. 5, which was based on the case of *Mining Co. v. Consolidated Co.*, 102 U. S. 168, in which it is held the question, "were the disputed premises at the time of the grant known to be mineral—that is, known to be valuable for minerals?" In the federal case cited, a grant *in praesent* of public land for school purposes *and* an agricultural state patent for the same were held *void* in a collateral attack by reason of the fact that the lands or part of the land was *known* to be mineral at the time of the patent; and in the same case the federal court pointed out the analogy of the rule of exclusion between *the act and railroad grants.*

It is ominous that counsel cited no authority to uphold the *Lindley* proposition that the law relating to known mineral lands at time of patent did not apply to agri-

cultural instances. Mr. Lindley, in the footnote to the text, citing as his sole authority, says:

> *"Scott v. Lockey Investment Co.*, 60 F. 34. *As opposed* to the doctrine of the text see *Kan. City M. & M. Co. v. Clay, (supra)*, 29 P. 9. Also, *Garrard v. Silver Peaks Mines*, 82 F. 587, C. C. of App. 94 F. 983."

The cases cited by Mr. Lindley under section 161 of his volume that "an agricultural patent" is conclusive, will ALL be found to be those cases digested in this brief, instances of where it was admitted that the *patents* issued within the jurisdiction of the land department, after examination and actual adjudication, which were *merely* voidable patents that could only be attacked by an antecedent title for fraud, imposition and mistake, and every case cited by Mr. Lindley and counsel were just such cases and not one of those passed on the question of *"known"* mineral lands rendering the patent void, and as a matter of law we contend that the patent *is void* for if the prior claimant stands by and after public notice allows the land to proceed to adverse adjudication he may only establish his antecedent title on the single *grounds of fraud, imposition or mistake* that illegally prevented the patent flowing to the antecedent title! This is the simple, elementary rule overlooked by Mr. Lindley and counsel on this subject, and this en-

tire controversy practically turns on this single, well-established proposition, viz: *"Both* the government and the grantee, as well as those in privity with him, *are bound by the recitals* of fact property contained in the patent, *(McGarrahan v. Idria Min. Co., 49 Cal. 331, S. C. 96 U. S. 316; Dean v. Long, 122 Ill. 447; Cyc. Vol. 32, p. 1038);* *but an opinion* of an executive officer *as to matters of law* indicated *(either) by the act of issuing the patent is not conclusive,* (Cyc. Vol. 32, p. 1038)," and the patent may be *examined by "searching the antecedent" record and there being no record in our case,* the patent at best is only *"an opinion of law evidenced by the issue of the patent!"* A patent may be shown to be void by searching the antecedent record. (Cyc. Vol. 32, p. 1043; *Andrus v. Wheeler,* 18 Misc. (N. Y.) 646, 42 N. Y. Suppl. 525; *Bledsoe v. Well,* 4 Bibb. (Ky.) 329), and when the court in this case finds there was no antecedent record, how may the patent be upheld? Furthermore, patents issued under railroad land grants are not subject to the rules and regulations relating to the issuance of patents for "agricultural lands." Pre-emption and homestead entries are governed by specific statutes that have no bearing on patents issued under railroad land grants and the land office regulations are not the same or alike.

An excellent work on mining law is *"Snyder on Mines."* In sec-

tion 205 he points out the error of Judge Sawyer in the *Cowell-Lammers and Francour-Newhouse cases*, and speaking of the conclusiveness of a patent properly adjudicated and containing recitals, the author says, (Sec. 209): "This observation, of course, has no application to a case where the patent *itself, pursuant to law,* expresses a reservation on its face. In such case, the reservation being barred out of the grant, the subject of it does not pass," and at Sec. 159 he cites our basic cases of *McLaughlin v. Powell, Alford v. Barnum, Merrill v. Dixon, Iron S. M. Co. v. Mike, etc.*

There is no difficulty in our case arising over the distinction between void and voidable patents as contended by the defendants. In *Horsky v. Moran,* 178 U. S. pp. 211-12, the court said:

> "On the face of the patent there is nothing to suggest *any exception.*
>
> "While it may be conceded, under the authorities which are referred to, that, in an action at law by a claimant under that patent, the existence of the *mining claim* at the time of its issue might be shown and be a valid defense to a recovery of so much of the ground as was included *within the mining claim,* and in that event it may perhaps be not inaptly said *that the patent was to that extent void,* * * * *(citing U. S. v. Stone, 2 Wall. 525). In such cases* courts of law will pronounce them *void.* The

patent is but evidence of the grant and the officer who issues it acts *ministerially* and not *judicially.*"

In the court below counsel produced all sorts of extraneous proof in discussing the demurrer and cited land office records and correspondence and asked the court to take judicial cognizance of all things necessary to uphold their views, and we assume, therefore, it will not be amiss for us to call the attention of the court to some "real existing facts," and not fallacies that do violence to the real situation. We do not ask this court to assume anything in any particular *that is not absolutely the concrete undisputed record fact,* and therefore we say we assume this court will take judicial cognizance that hundreds of thousands of the granted acres are wholly agricultural and are solely devoted to agricultural uses, and that even the deserts around Mecca, Indio, Imperial Valley, etc., with artesian water at 300 inches, produce from six to ten crops each year! And further, that under the grant of July 27, 1866, the Southern Pacific Railroad Company has received ten million of the richest acres in the state *and over one-tenth of all the timber lands in the United States,* (see congressional debate concerning joint resolution of June 28, 1870, and recent report of Commissioner Knox), while the patent in controversy carries only 440,000 acres

and the acreage in controversy is only 3200. We further presume the court will take judicial cognizance that the country coterminous with the railroad from Goshen junction to within a few miles on the east from Coalinga is purely and richly agricultural and horticultural, as is the country from Alcalde to San Jose, including the famous fruit and alfalfa lands of the Santa Clara valley, while the lands in the Imperial Valley secured by the defendant railroad company are worth many millions of dollars! and are purely agricultural.

So it is with the claimed legal fiction of repugnancy which practically and actually amounts to nothing, but as "actuality" is not the base of the railroad defense we cited the following cases:

Painter v. Pasadena Land & Water Co., 91 Cal. 74, 83;

Adams v. Warner, 23 Vt. 395-414;

Foster v. Runk, 109 Pa. St. 291, 58 Am. Rep. 720, 721.

In the last cited case the court had under consideration a deed in which all mineral and metals were excepted and reserved. It was claimed that the reservation being as broad as the grant, was void, but the court thought differently, and after saying that the proper construction to be placed on the deed was that which

is made by viewing its subject-matter as the mass of mankind would view it, and continuing, said:

> "Construing the deed before us by this, the only proper rule, and there is no doubt but notwithstanding the very general character of the reservation, there was *something left* upon which the grant could operate, that the latter did not include the ordinary glebe, timber or waters."

And in *Adams v. Warner, supra*, the court said:

> "All reservations and exceptions, conditions or limitations upon a grant *are of necessity*, to a certain extent, inconsistent with the grant, becomes void. If an exception be of the whole thing granted, so that by giving effect to the exception the grant would become wholly inoperative, then it becomes *certain* the exception could not have been intended in that sense; and as it is impossible to know what it did mean, to save annulling the grant altogether the exception is held void. And so in all the cases, where any such rule of construction has been adopted, it has been for this reason, *and as a matter of strict necessity*."

THE STATE AND FEDERAL STATUTES OF LIMITATION ARE NOT APPLICABLE TO THIS SUIT.

We come now to the much insisted contention of counsel in reference to the binding force of the state and federal statutes of limitation as bearing on the mineral exception, and it may be said, as argued by us in

the courts below, that the whole contention of the defendant railroad company was not that it claimed any title to the property *but that owing to the law* it was immune from attack by this complainant.

At first the state statute was strongly relied on, then apparently abandoned as the defendants being out of possession (and never in possession as alleged and admitted), and the suit being to quiet title, the state statute did not apply.

Brusie v. Gates, 80 Cal. 462;
People v. Center, 66 *Id.* 552;
Casey v. Leggett, 125 *Id.* 672.

It occurs to the writer of this brief that in reason and by analogy the same rule should apply in construing the pleaded federal statute of limitations of March 2, 1896. Both in the *Chandler-Dunbar case,* (209 U. S.) and the *Louisiana-Garfield case,* 211 U. S. 77, the federal statute, unlike the state statute and all state statutes, on the subject, was determined to be a statute establishing a title not by prescription *but by way of a new grant,* and under no state statute may a title by prescription be established *where the defendant has not been in open, notorious* and continuing possession, under a claim of title, of the controverted land during the running of the statute! Such was the fact in the two

federal citations. If under the state statute an action was brought by the state to annul a patent for state lands the statute could not be pleaded by one who was out of possession and had never been in possession, and we doubt if even the defendant could plead the federal statute for such reasons against the United States, even in a case where the government brought an action to annul a patent.

Passing directly to the federal statute we find that Judge Ross did not in any way pass on or refer to the question except by implication in sustaining the general demurrer, which also contained the plea of the state and federal statutes. *The Act of March* 3, 1891, reads as follows:

> "Sec. 8. That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of such issuance."

The Act (pleaded) of *March* 2, 1896, reads as follows:

> "That suits by the United States to vacate and annul any patent to lands heretofore *erroneously issued under a railroad* or wagon grant shall only be brought within five years from the passage patents hereafter issued shall only be brought within six years after the date of the issu-

ance of such patents, and the limitations of section 8 of chapter 561 of the acts of the second session of the fifty-first congress (Act of March 3, 1891) and amendments thereto is extended accordingly *as to the patents herein referred to. But no patent to any land held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed.*"

So far as the land in controversy is concerned the fears of counsel that titles might be disturbed are without foundation and the same might be said of all the "mineral lands" claimed by the defendants as all such lands have been leased, and counsel will not dispute the fact, to the defendant Kern Trading and Oil Co., a subsidiary corporation wholly owned by the defendant railroad company.

It will be seen, so far as *bona fide* purchasers are concerned, that either a new grant is made to them or their previously bad or void or erroneous title is made good and the sale to them by the railroad company, ratified and confirmed, and thereby any apprehension of the solicitous railroad company concerning its "innocent" grantees *(and lessees!)* may be allayed. If persons, other than the Kern Trading and Oil Co. have acquired other mineral lands from the defendant railroad company, they may not make the plea of being innocent purchasers if their conveyances from the defendant railroad

company reserved *"all claim of the United States to said tract as mineral lands."* The suggestion is hypercritical as all persons in possession of lands under color of title, etc., are protected by the California statute of limitations as against "jumpers" and the United States has never troubled and will never trouble a *bona fide* settler. It may be that such *"innocent"* purchasers as the Kern Trading and Oil Co., the Standard Oil Co., the Associated Oil Co., may have some unpleasantness with the United States but up to date those companies have not suffered much through their *innocence.* We fear the tears of counsel that may be shed in their behalf will be unnecessary. So it is with the millions expended on those "agricultural" lands by the defendant railroad company! though nothing was said by counsel in the courts below concerning the many more millions extracted from those "agricultural" lands through the production of minerals!

Concerning the application of the statute (or statutes) to the suit we find that in any event *the statute ran only against the United States* and may not be pleaded against a private litigant, even if that litigant be standing in the place of the United States.

Holloman v. Bullock, 82 Miss. 405;
Peabody v. Gold Hill, etc., 106 F. 241;
Van Ness v. Rooney, supra.

In *Van Ness v. Rooney*
the California Supreme Court said:

(2) "The argument of the defendant that plaintiff is debarred from the relief he seeks because of the provisions of the act of congress of March 2, 1890, *is* wholly without merit. Plaintiff *is not* seeking in this action to *annul* or avoid a patent issued by the government of the United States. *The effect of granting the relief he seeks* does *not* in any way invalidate the patent in question. It is an interpretation of the instrument that will be brought about by the judgment in this action which will determine what, if any, lands in Sec. 29 of township 35 north of range 7 west M. D. M. *are included in the reserving clause of the patent*. It is safe to presume that when the president of the United States was about to sign the patent if it had been called to his attention that there was on said section 29 a quartz claim which had been duly located which was being worked which had definite bounds, or could be interpreted and defined, that he would have refused to sign the patent until those lands had been expressly excepted. But to *except* such lands *it was not necessary* for him to know an actual location had been made. *There* could be an actual, as in this instance it was, *without* the knowledge reaching the land department or the president *prior* to the issuance of patent. By virtue of such location, and because of the mining statutes and by reason of the interpretation made by the Supreme Court of the United States as to the effect of such location, the land embraced in the location had passed into the possession and control of the locator, his location had as effectually given him a right

to the possession of the located claim, as if it had been granted to him by the government of the United States."

Again, we find the limitation, in any event, is of kind; that is, the statute of 1891 was extended to the class of patents referred to in the Act of 1896 and simply prolonged the statute of 1891 to *past* patents for six years from March 2, 1896. In connection with the statute of 1896 we cite the *Winona case*, 165 U. S. 476, in which the act was construed and applied in the matter of the *validation* of *bona fide* purchasers and the validation paragraph in the Act of 1896 is conclusive *that no other* validation was contemplated!

There must be some basis for the action of the land department. Suppose that the land department had more than six years ago, quietly and without authority of law, patented to the defendant railroad company the postoffice building and grounds in San Francisco and the railroad company had quietly lain away the patent until yesterday, will it be contended that the statute validated the patent? Not at all! Why? Because under the *Dunbar-Chandler case the "mineral" land was not in kind*, as the Supreme Court said, *open to sale to an agricultural claimant* through the land department, and by analogy, mineral lands, say to the extent of 440,000 acres, *was not in kind* open to sale to an agri-

tural claimant under a grant of agricultural
d that expressly precluded mineral lands and
s the patent, in any event, affords no protec-
n except, possibly, to those "in kind" *entitled*
purchase the particular kind of land *not ex-*
ssly excepted from the operation of the grant.

The statute of 1891 ap-
ed to *all* classes of patents, void and voidable,
ile the specially superceding and applicable (if
y) land grant limitation act of 1896 applies
y to a *"voidable"* or *erroneously issued patent,*
t is, to patents *erroneously* issued within the
isdiction of the land department, through
ud, imposition or mistake, by means of fraud,
se testimony, forged documents, offered on ap-
cations for land under land grants (which, not-
thstanding counsel, the law and the canons of
rality do not require the court to assume to be
e, when they are admitted to be false), and
ere the only validation in the act is the verifi-
ion of the voidable titles of *bona fide* pur-
asers.

The Act of 1896, on
ese points, has never been passed on while the
t of 1891, under the *Chandler-Dunbar* case,
lidated all void and voidable patents on the
aning of the statute, and might have applied to
e patent at bar if we were seeking to *"annul"*
as we are *not*, only that before the statute of
91 in any event, ran, the statute of 1896 was

enacted and in view of that case the Act of 1891 must be in force today and control all federal action, in proper cases, against patents *except those issued under a railroad or wagon road grant,* but it cannot, we say, be contended, successfully, the statute of 1896 does not supercede the statute of 1891 insofar as the patent under consideration is concerned, and only the statute of 1896 is pleaded by the defendants.

Consequently, and in any event, it necessarily follows that even the United States is not limited by the statute of 1896 insofar as a void patent is concerned but only as to *"erroneously issued patents"* which, in any event, would require a direct attack by the United States and would not be subject to collateral attack in any event by an individual except in cases of fraud, imposition or mistake, and when he was in privity with the antecedent title.

Again, it is clear, as stated by Mr. Justice Holmes in both *the Chandler-Dunbar* and *Louisiana-Garfield cases,* that *no* title by prescription is established *but that a new grant is made by prescription and that the base of the grant is the validated void patent and not the original grant under which the patent purported to have issued,* for as the court said in the latter case: *"In U. S. v. Chandler, etc., it* was decided that this act (1891) applied to patents *even if void,* because of a previous reservation of

the land," and in the former case the court fairly and squarely said that the *validatea patent was a new independent grant.* Two things are clearly established by the two cases, namely:

1. That the reservation spoken of in the *Louisiana-Garfield case* was one for ordinary governmental uses and did not contemplate anything except such a specific federal reservation, like a reservation of specific land for the use of Indians, etc. This was so, as we shall later see, for in that instance the *United States was solely interested* in the land as specifically pointed out in the *Chandler-Dunbar case,* with no outstanding equitable or possessory titles, and if the patent was cancelled the land would revert to the public domain. There was no authority for the issuance of the patent at bar, and the *validation of the patent, by either statute, validated the exception therein contained.* Suppose this court finds that (1) that the patent was not issued in conformity with law, *for any reason,* it would necessarily follow that the patent would not convey title from the United States and consequently unless there was a subsequently validation of the patent, the only title, possessory title, the defendant railroad company would have, would flow through the grant and in that event it must be conceded our mining locations made in 1909 were valid. If, however, there was a subsequent validation of the patent the title of the defendant

railroad company would rest on the patent and if the "terms of conveyance" were thus validated *the mineral exception would be necessarily validated as it is a part of the description.*

Finally, on this point and at this part of our brief, though we shall later revert to a single specific proposition concerning it, we pass to the question that, assuming if the patent was for any reason void and was validated by either of the limitation acts, *did not such validation extend to every part of the patent and validate the exception of mineral lands?*

It has been repeatedly held that the base of the railroad title is the grant and not the patent which, at best, is only evidence of the title. If, for any reason, the patent was VOID, then concededly the railroad defendant could not prevail against a prior or subsequent valid mining location. If, by reason of the fact that the land was known to be mineral at the time of the patent or if the land was not a part of the public domain at the time the patent issued, then the patent is concededly void and if it be held that in such an instance the railroad defendant would be without title were it not for the validating statute of 1896, then it must follow and must be held that the *patent is the base* of the title as *Justice Holmes said the such validated patent is a new grant* and the railroad company would take solely by the patent *and not under the grant*, the

latter being *functus offico* and this situation arises, namely, neither on the date of the issuance of the patent or since could the railroad company, independent of the patent, retain the lands under the grant as they are mineral lands, and if they may retain the lands at all it must be by virtue of the patent issued and validated on the single theory that the United States, *being the sole owner, and the lands in kind being open to sale through the land department,* had the right to dispose of them accordingly, *independent of the grant,* and consequently, as the patent was validated independent of any granting statute, the title in the Southern Pacific exists solely through the patent and under the terms of the patent *which includes an exception of mineral lands* and it is competent now, for the mining locators to show by oral and other testimony the mineral character of the lands and *thus avoid the patent.*

The railroad company contends, by pleading the statute against certain of our contentions, that the base of its title is the patent validated by the Act of March 2, 1896, and such contention must, in the face of this bill and the demurrer, be true if the patent exists at all! *It is not and cannot be contended under such a plea that a patent issued without authority of law and validated by authority of law violates the law by the inclusion of the validated mineral exception. It does not violate the granting act because,*

in any event, the granting act is not the base of title, and it does not violate any law because it exists, if at all, because each and every letter and word in it has been validated by a statute which creates a new grant!

Counsel simply *assert* that the *Chandler-Dunbar* case did not hold that the statute of 1896 validates a void patent while the case says directly to the contrary as plain as words may make a sentence. Counsel say the case *merely* applies the familiar rule that a statute of limitation in regard to real property confirms the right as well as barring the remedy; that is a very superfine distinction but it does not do away with the positive ruling of the Supreme Court that the validated void patent *constitutes a new grant.* Very scant consideration is given to the subject by counsel who simply persist in being mistaken as to what the case holds and then back to their familiar proposition that our construction would not aid us because we are not in privity with the validated patent but surely we are in privity, in any event, *if the new grant validated the exception clause* for that withholds the legal title to the United States.

The position of counsel is similar in this regard to that of the United States in its motion for a re-argument in the *Chandler-Dunbar* case, which motion was denied. Government counsel argued strenuously that what

was "void" *could not* be validated; that twice nothing is nothing still, but the Supreme Court held to its positive ruling that the statute validated the void patent which amounted to a new grant of the controverted lands.

Then counsel here argued that in any event the validation would not extend to the patent because such validation would take back by the patent what was given by the grant! *Were unknown mineral lands given by the grant, or contemplated by the grant?* If not *(Barden case)*, their suggestion is fallacious to say the least and then in the last attempt to cast an anchor to the windward counsel cite from the *Chandler-Dunbar case this language:*

> "Counsel for complainant (the U. S.) raised two objections to the application of this statute. One that this suit is not a suit to annul the Chandler patent but only to maintain the title to these islands. * * * This amounts to a contention that, although the patent could not be attacked directly after the time prescribed, yet it may be done indirectly, for the purpose of controlling an incident, the right of which flows from the patent itself. The proposition is too untenable for argument."

Why such citation was made is not apparent as we made no such contention and will not. But here is something we do contend: "But," continued the court,

> "we add that the general rule *is that possession of land under a claim of title* for a period prescribed by the statute of limitation vests the title for him for whose protection the statute creates the limitation; and if, as we think, possession is not necessary under this statute, the lapse of time is of itself sufficient to effect the same result."

While the above would indicate that possession is not necessary to plead the statute against the United States *it does not follow that possession is not necessary to maintain any statute of limitation between individuals contesting under the paramount title,* and we strongly urge this point on the consideration of the court. And then counsel said: "And there is no ground for the construction attempted to be given the *Chandler - Dunbar, Louisiana - Garfield cases.* There is nothing in Justice Holmes' language or holding in either of those cases that would lead to the one that he considered the statute after the time had run, a new grant in the form of the patent." Would it not have been better for counsel to have stated just what the court said on the subject? The language is plain as will be seen by reading (p. 450):

> "The patent had been issued in 1883 by the president in *due form and in the regular way.*
>
> "Whether or not he had authority to make it, the United States had the power to make it *or to validate it when*

> *made* since the interest of the United States *was the only one concerned. We can see no reason for doubting that the statute,* which is the voice of the United States, *had that effect.* * * * This statute must be taken to mean that the patent is to be held good and is to have the same effect against the United States that it would have had if it had been valid in the first place."

And in construing this case the Supreme Court said in *Louisiana v. Garfield,* 211 U. S., p. 70:

> "In U. S. v. Chandler-Dunbar Co. it was decided that this act applied to patents *even if void* * * * *and it was said* that the statute *not merely took away the remedy but validated the patent."*

What, then, becomes of the contrary contention of counsel? We await their answer!

And continuing the court said:

> "In form the statute only bars suits to annul the patent (just as counsel contended), but statutes of limitation with regard to land, at least, which cannot escape from the jurisdiction, generally *are held to affect the right,* even if in terms only directed against the remedy (citing cases)."

And counsel added: "Showing by validation he meant absence of power to attack," which, in view of the language

just quoted by us, seem to us to be an extraordinary conclusion! And counsel continued: "As pointed out (*supra*) while this power existed (evidently the power of validation?) in the government, the government could not, however, take from the railroad company what the patent granted (note: the void patent could grant nothing!) and therefore could not validate the exception. And see also," said counsel, "*U. S. v. Smith Advance Sheets*, Fed. Rep. Vol. 181, No. 3, at p. 545, this language: 'The object of this statute is to extinguish any right the government may have had in the land and *vest a perfect title* in the adverse holder after six years from date of the patent *regardless* of any mistake or error in the land department or the fraud or imposition of the patentee.'" And the record in that case shows that the court was discussing a *voidable* and not a void patent and consequently the case fully agrees in every particular what is stated here.

Counsel closed their discussion of the subject by referring to the *voidable* patent case of *Peabody v. Gold Hill Mining Co.*, 106 F. 241 and 111 F. 821. We have no contest with that case; we only say it has no application. A stranger applicant subsequent to the patent issued *after* full and *complete* proof and *adjudication attempted to impeach the voidable* patent for fraud, imposition and mistake! Such is not our suit. The allegations in our bill of complaint that

the defendant railroad company caused a false and fraudulent application to be made for patent are not to be construed as an attempt on our part *to review* any finding of fact made by the land department and at this point we concede, as we have always done in this suit, that any finding except one, made by the land department herein are conclusive, and the one exception is the finding recited in the patent that the said tracts of lands lie coterminous to the constructed line of railroad and we set forth the application of Mr. Madden for the purpose of showing that the lands in controversy were not within the primary limits of the grant of July 27, 1866, under the theory expressed by Judge Bellinger in *U. S. v. Coos Bay Wagon Road Co.*, 89 Fed. 151. Whether lands are *within the limits* or subject to a grant *is not a question of fact* within the rule that the judgment of the land department is final in questions of fact. We were not and are not charging fraud, imposition or mistake concerning any question of fact decided by the land department that resulted in a decision within the above rule.

Such was the contention of counsel on the subject; they had nothing else to suggest and it simply goes back to their old proposition that it will be the duty of this court to "assume" that this court did not decide as the court said it did! Will counsel now say that, assuming the patent was void, that the statute of

1896 did not validate the patent as a part of the whole or if the patent was void and conveyed nothing did not the Act of 1896 give life to the exception as well as to the remainder of the granting clause, it being the part of an otherwise void granting clause, and if in accepting a void patent containing a void exception the railroad company is not estopped as against the government from denying the estoppel?

We will await the reply of counsel with some curiosity!

IV.

The fourth question certified to this court reads: "IF THE RESERVATION OF MINERAL LANDS AS EXPRESSED IN THE PATENT IS VOID, THEN IS THE PATENT ON A COLLATERAL ATTACK A CONCLUSIVE AND OFFICIAL DECLARATION THAT THE LAND IS AGRICULTURAL AND THAT ALL THE REQUIREMENTS PRELIMINARY TO THE ISSUE OF THE PATENT HAVE BEEN COMPLIED WITH?"

In such connection with such question we admit:

1. That if the patent in the language of the *Davis-Weibbold* and *Deffebach-Hawke* cases had been made up *"with recitals showing compliance with conditions* which the law prescribes," that such a patent, the min-

eral exception being nugatory, *would be conclusive.*

2. We admit that if the patent contained a statement of the quality of the land as required by the *Barden* case and proper recitals the patent *would be conclusive,* provided it issued on a jurisdictional record; but we contend being in privity with the federal title by reason of our relocation under a forfeiture of a prior location, we can maintain our direct action to avoid the patent and quiet our title under any circumstances.

3. We admit that if the patent was *perfect* in form and contained the recitals and statements required by the *Davis-Weibbold case* and the *Barden case* and the *Deffebach-Hawke case,* the patent would be conclusive, except as against our allegation that the patent is void, having issued in the presence of the prior mining locations.

4. Mr. Justice Field in the *Davis-Weibbold* case, 139 U. S. at 526 *(and in the same language in Deffebach-Hawke,* 115 *U. S. at* 406*)* considering what the effect of a patent was, said:

> " * * * *If the mining patent states* any initiating steps *in acquiring* title which antedates the title of the townsite, *that may suffice in an action at law,* but in this the patent *does not* show any initiating steps; *it merely refers* to the entry of the min-

ing claim and that was after the patent issued to the townsite.

"*No proof* was offered to show when the *mining claim was originally* located; * * * the absence of any proceedings *required by law* to initiate a right to a mining claim, *which* he might perhaps have shown would have been very pursuasive that no mine was known to exist."

We contend that this case is conclusive of our proposition that it requires a perfect patent to set the presumption of regularity in motion.

It seems to us that those two cases are decisive of the controversy here under the question under consideration as the patent before this court *lacks every element* which those two cases say was necessary to make a patent conclusive.

The argument of counsel in the courts below was to the effect that the *issuance* of this particular patent was a conclusive determination of the performance of all necessary antecedent steps, independent of any other fact; and that the lands contained in the patent description must be presumed to be agricultural as we have seen it is not conclusive that the lands are within the primary limits or subject to the grant as the patent contains no recitals on the subject and there is no antecedent finding on these subjects or concerning the quality of the land.

They did not argue that the presumption flowed from the *patent* but from the mere *"issuance"* of the patent; that the patent in itself amounted to nothing but that the "issuance" of the patent was everything, including statement, recitals, antecedent examination and determination!

The Circuit Court of Appeal evidently took no stock in any such hair-splitting theory as they certified no such question to this court. They do not ask if the *"issuance"* of the patent constitutes a conclusive and official declaration but they squarely ask *"then is the patent* upon a collateral attack a conclusive and official declaration," etc.

In this connection it must be remembered that we are not under any circumstances making a collateral attack on the patent. We are not seeking to destroy *any finding of fact* and a collateral attack *must always* and in every instance *be based on some finding of fact* made in another or different action or proceeding. While we uphold the patent as it is written our attack on the patent is based on the proposition that having issued in the presence of the prior mining location is *void* and such attack is *direct* and not collateral.

We attack no finding of fact made by the land department antecedent to the issuance of the patent; neither do we at-

tack any recital in the patent except that the lands are coterminous with a completed section of twenty-five miles if it can be inferred that the patent contains such a statement.

In a more or less rythmic flow of language some courts have, as it is evident from a study of the decisions, used the term "issuance of a patent" inadvertently in speaking of a patent and there stated that the issuance of a patent creates the presumption of regularity but in every instance, *and counsel* cannot show *to the contrary,* it was in case of a patent properly made up "issued in proper form" *containing necessary recitals* and in these cases the patent "controlled the situation," not the issuance of the patent but the patent. For example, suppose the S. P. R. R. Co. in this suit simply contented itself with showing that a *"patent issued"* without introducing or producing a patent, would it have any defense?

Surely not and yet such is their contention! Suppose the British again destroyed the national capitol and the records of the department of the interior were again destroyed as the San Francisco earthquake destroyed the records of the Southern Pacific Railroad Company, could the defendant railroad company win this lawsuit by simply showing "a patent issued" without making any proof of the contents of the patent, Surely not. And if in such instance the

Southern Pacific Railroad Company made secondary proof of the patent, which would be controlling, the patent, or proof of a clerical entry *that wholly without any supporting record* "a patent issued?"

Counsel evidently realized their dilemma and in the courts below contended that the patent, *wholly independent of its contents, its lack of recitals,* the piece of blank paper was the *"decision"* and *was the statement of quality.* They admitted a statement in the patent *was necessary* but contended the patent *itself* was the statement—only the force of arms, the arbitrament of the sword, could successfully establish such a proposition! Hard pressed, counsel said: *"Adequate examination is presumed by the patent. The patent is the determination;* and the *issuance of a patent under any particular 'grant' is the 'expression'* that the land is of the character contemplated by the grant and constitutes the *final declaration* of the government that all requisite preliminary steps have been taken," citing 32 L. D. 342, and the L. D. case cited is the one in which an assistant attorney general, construing the *Barden* case, says, notwithstanding his citation of that case, that he did not believe it necessary, however, to insert any such statement in the patent! That is the scanty "authority" of the defendants for the most remarkable proposi-

tion that ever fell from the lips of a *"juris consult"* and that is saying a great deal.

The contention of counsel simply amounts to this: "That wholly without a record, the land department, wholly without its jurisdiction, may issue a patent free from any statement or recital and that this court must *presume everything* that may be necessary to uphold the patent on account of its *'issuance.'"*

It will be noted in this connection that it was held in the *Kemp, Steele and Barden* cases that any presumption arising from the issuance of a patent or from a patent was limited in its operation to actions in *a court of law,* and not applicable to *equity.*

In the *Steel case* this court said: "The presumption thus attending it (the patent) are not open to rebuttal in *an action at law."*

In the *Kemp case* this court said, speaking of a patent: "The presumptions attending it are not open to rebuttal *in an action at law."*

At this point and at a time when we are about to take up and discuss the citations of counsel on this subject we wish to impress on this court the fact that the only *collateral* attack that is being made on this patent is being *made by the defendant.*

We uphold it as it is written in every word and letter and figure.

Counsel said "upon a collateral attack the patent is not only a conclusive declaration as to the character of the land but is also a conclusive declaration that all requirements preliminary to its issue have been complied with, citing:

Minter v. Commelin, 18 Hon. 87;
Smelting Co. v. Kemp, 104 U. S. 646;
Moffat v. United States, 112 U. S. 24;
Steel v. Smelting Co., 106 U. S. 450;
Carson City v. North Star, 83 Fed. 665;
Doe v. Mining Co., 54 Fed. 935;
Eureka Case, Fed. Case 45, 47;
Barden v. N. P. R. R. Co., 154 U. S. 288;
U. S. v. Ry Co., 67 Fed. 948;
Moore v. Robbins, 96 U. S. 530;
French v. Fyan, 93 U. S. 169;
Noble v. Union River Logging Co., 147 U S. 165;
King v. McAndrews, 111 Fed. 860;
Buena Vista Co. v. Tulare Co., 67 Fed. 226;
U. S. v. Mackintosh, 85 Fed. 333;
N. P. R. R. Co. v. Soderberg, 86 Fed. 49;
Cosmos Exploration Co. v. Gray Eagle Oil Co., 104 Fed. 20;
Wright v. Roseberry, 121 U. S. 488;
Heath v. Wallace, 138 U. S. 573;

McCormick v. Hayes, 159 U. S. 332;
Lindley on Mines, 2d Ed., Secs. 161-162, 779.

A brief digest of each of the above citations will show their respective inapplicability.

1. As a primary point it is urged that in every instance the observations of the courts in the above citations were made in instances of *"voidable patents issued within the jurisdiction of the land department, based on an adequate record, resulting in an actual adjudication that in the record the applicant was entitled to a patent, thus leaving open only the antecedent title to its action to charge the patentee with a trust by reason of fraud, imposition or mistake in the actual proceedings!* And in each case *the antecedent record was before* the court for consideration.

Take for instance their citation of *Eureka case*, which is wholly in our favor. Mr. Justice Fields said in that case:

> "If the date of such location be stated in (patent) or *appear from the record* in the local land office, the patent will take *effect* from that *date*. It is *only* where an *adverse* party was required to *adverse* and fails *that the presumption of regularity arises*, and when no opportunity is presented to adverse *the rule necessarily fails.*"

2. *French v. Fyan* simply holds that in a case arising under the *swamp land* act the *decision* of the secretary of the interior in *designating* land as *swamp land* is not open to review in a collateral attack in an action of ejectment, that the land *was not* swamp land and in that case (93 U. S., p. 169) this court, sustaining the *decision* of the secretary of the interior, said:

> "But a careful examination will show that it *(decision in R. R. v. Smith, 9 Wall, 95)* was done with hesitation and some dissent in the court. The admission (of testimony) in that case was placed expressly on the ground *that the secretary had failed or neglected or refused to do his duty.* (* * *) (And that is the exact condition in this suit) * * * the matter to be shown is one of observation and *examination,* whether arising before the secretary whose duty it was to *primarily* decide it, *or before the court whose duty* it became because the secretary failed to do it."

The case is not only wholly in point and in our favor but it answers fully the question of Judge Ross in the *Roberts* case when he asks "where did the officers of the government * * * get authority to cast upon courts or juries the duty of determining the character of the public lands?"

A further answer to this question will be found in *Wright v. Roseberry,* 121 U. S. 488, in which a pre-emption

patent issued on the application of a duly qualified pre-emptor was held *not* conclusive and a claimant seeking under a state swamp land patent was permitted to show, notwithstanding the pre-emption patent, that the *secretary of the interior* had failed *to pass* on and *decide* the quality of the land which the state patentee claimed was swamp land. It was strenuously claimed in that case that the federal pre-emption patent was conclusive of every fact necessary to uphold its issuance but this court held the pre-emption patent was not conclusive *and the duty was cast on the court of determining the quality of the land!* and similar rulings will be found in *Cyc. Vol. 32, p.* 1043; *Andrews v. Wheeler*, 18 *Misc.* (N. Y.) 646; *Bledsoe v. Wells*, 4 *Bibb* (*Ky.*) and in *Doe v. Mahana*, 21 *Howard* (*U. S.*) 276, a similar ruling was made by this court, and alike decisions were also made by this court in *Hedrick v. Hughes*, 15 *Wall.* 123, and *Johanson v. Washington*, 190 *U. S.* 179.

An interesting case arose in *E. O. L. Co. v. Brosnan*, 147 *Fed.* 807. There had been a grant of land to the state of Oregon under a wagon road act and after due compliance with the law there was a finality and the state, under the grant, issued its patent and the title through mesne conveyances reached the plaintiff who claimed possession, etc.

It appeared that *long after* the issue of the grant and *long* after the

issue of the patent the defendant made an agricultural entry on the land, claiming that prior to the taking effect of the grant the lands had been occupied by a *bona fide* settler *other than himself* and that by reason of such fact the title remained in the United States and did not pass by the grant and patent, and that he thus obtained the right to take up the land *in the presence of the patent.*

The claim was allowed by the interior department and defendant took possession of the lands.

In an action of ejectment the court held that if the *prior* occupant of the land had made a declaratory statement the lands *did not pass* under the grant and patent and defendant had the title; that if the *prior* settler had made no declaratory statement *the title did pass* to the state and its patent could not be attacked! *And* so far as our claim of the force of the prior mining claims is concerned and of the invalidity of the patent in such connection, it is our case in a nutshell. It covers every question of privity with the paramount title and conclusively shows that the segregation of the land under the prior settlement kept the legal title in the United States and that when the equitable title was lost or abandoned the right of re-settlement could be made in the presence of the grant and patent!

If the prior mining lo-

cations were made according to law the *title did not pass;* if the prior locators were mere squatters then it did in so far as those locations were concerned, but as the demurrer admits that the prior locations were made, it will be difficult to discover how the title could pass in presence of such locations.

McCormick v. Hayes, 159 U. S. 332, cited by counsel, is distinctly in our favor. In the case, this court, concerning when the courts *have* permitted in subsequent suits oral evidence to determine the character of lands claimed to be swamp and overflow, said, *page* 342:

> "There is in this case (citation) no conflict with what we decide in the present case, but, on the contrary, the strongest implication, that if, in that case, the *secretary had made any decision,* the evidence would have been excluded."

The case clearly holds that a *decision,* an actual decision, is necessary in order to make a patent conclusive and declarative—an attempt had been made to defeat the *action* of the secretary of the interior in a certain instance by means of a collateral attack but the attack was defeated for the simple reason *that the antecedent record* showed that the secretary had made an antecedent *decision* and so it is with their citation of *Noble v. Union River Logging*

Co., 147 *U. S.* 165.

Time and time again in the courts below counsel cited the L. D. case of *Courtright v. Wisconsin Central Rail. Co.* (19 L. D. 412), but made no reference in their arguments to the vital point decided by Secretary Hoke Smith and decided erroneously, too, in that case—discussing a railroad land grant, he said, (p. 412): *"The grant passes title and patent is unnecessary for that purpose."*

Will counsel so contend here?

If counsel rely solely on the grant of July 27, 1866, and so contend, their day in court will be one of mourning, for by so contending they would lose, absolutely, the mineral lands! All through this case counsel for the defendants contended that the grant was nothing and the patent everything, *nevertheless one of their principal citations distinctly avers to the contrary!* A court, a secretary of the interior or even counsel may not blow hot and cold at the same time and we submit that when they cite the land decision in *Courtright v. Wisconsin R. R. Co.* they must take all of it, and if *Secretary Smith* was right in saying, *"The grant passes title and patent is unnecessary for that purpose,"* it follows that the defendant railroad company is without defense herein, as the grant excludes "all mineral lands."

That the primal decision of Secretary Smith and his opinion is artificial and involved and was erroneous is clear in view of the well settled legal proposition that when a grant provides for the issuance of a patent *the title remains in the United States.*

Recurring to the case of *Noble v. Union River Logging Co., supra,* we find (1) with respect acts involving the exercise of judgment or discretion, the courts have no power to control the executive dissection but with respect to ministerial duties an act or refusal is subject to review by the court ("syllabus.")

That the secretary of the interior, in issuing a patent, acts in a ministerial way and not judicially was pointed out by this court in *many other instances* and when the secretary is *deciding* antecedent to the issue of the patent he is acting judicially and when he issues the patent as the result of the *antecedent* decision *or without it* he is simply acting ministerially and thus an erroneous issuance of a patent might be attacked as a ministerial act.

The remaining paragraph of the *syllabus* in *Noble v. Union River Logging Co.* reads:

> "2. Under the Act of March 3, 1875, granting to railroads a right of way through public lands, the question whether a railroad is entitled to the benefit of the grant is one for the secretary of the

> interior to decide, *and when decided and his approval noted upon the plats,* the act vests the right of way in the railroad company; and a revocation of the approval of the secretary of the interior by his successor in office is an attempt to deprive the company of its property without due process of law and is void."

It is difficult to see here the citation favors the Southern Pacific Railroad Co.

The *French-Fyan case,* 93 *U. S.* 169, cited below by counsel, is fully digested in the foregoing case and this court said:

> *"In French v. Fyan,* 93 *U. S.* 169, it was held that the *action* of the secretary of the interior identifying swamp lands, making lists thereof and issuing patents therefor could not be impeached *in an action at law* by *showing* that the lands which the patent conveyed were not in fact swamp and overflowed, although his jurisdiction extended only to lands of that class."

It will be observed that the court states, and the *French-Fyan case* absolutely shows that there had been an *actual identification and designation* of the lands by the *secretary of the interior.*

Further in the Noble-Union River Logging case, this court, at p. 175, after citing a number of cases which were cited by counsel as above under the certified question under consideration, said:

> "The lands over which the right of way was granted were public lands subject to the operation of the statute * * * which it was competent for the secretary of the interior *to decide and when decided and his approval noted on the plats* * * * *."*

So the case, like all the other cases cited by the defendant, is *absolutely* without force under the point cited as each of them, when discussing a patent, *presumed* and showed an antecedent record and *actual antecedent finding and decision* of which the patent is the result.

In looking over the transcripts of every case we have had access to, and that means nearly 100 % of the cases cited by counsel, we find that in each and every instance *there* was a record containing the antecedent record in the land office that *showed* an *actual formal antecedent* finding and decision and in these cases when a collateral impeachment of the patent was not permitted, the court decision was, in every instance, *based on an actual antecedent* decision by the land office that resulted in a patent.

The contention of the defendants that the patent is conclusive and declaratory of the agricultural quality of *all lands* embraced within the patent description is illogical, incongruous and *not* sustained by a single authority. To say that it is conclusive is to say that it

means the exact opposite of what it purports to say. It *shows* on its face that it was issued under the Act of July 27, 1866, and the joint resolution of June 28, 1870, which especially provided that the grant made should not embrace mineral lands of the United States. The patent itself shows that *only two things were adjudicated* by the *land department* and that is (1) that the line of the Southern Pacific railroad had been completed from San Jose to Tres Pinos (in California) and that the distance between these points was 252-479/1000 miles, and (2) "the *said tracts of land lie coterminous to the constructed line* of said road," and the granting act required not only construction but a completed section of twenty-five miles before patent issued! and there is no record or antecedent decision that the forty miles referred to in the Madden application had been completed.

This court will notice that it *was not even adjudicated* in the land department that *any* of the lands described in the patent "lie within the primary limits of said road" and *that the patent is absolutely silent* as to the location of the lands! Where will the defendants go to find their lands? To the record *of course*, for if the patent is conclusive, and it *must* be resolved against the patentee, the Southern Pacific Railroad Company may not claim a single acre of land, mineral or non-mineral, under the

patent of July 10, 1894, because it does not appear from the patent that the lands were granted or within the primary limits of the grant.

The plain inference from the patent is that no investigation whatever had been made, and the patent simply recites *"and whereas* the following tracts have been duly listed under the act aforesaid by the duly authorized agent of the said Southern Pacific Railroad Company as shown by his original list of selections, *approved by the local officers* and on file in this office."

This court will perceive it to be absolutely necessary to turn to the *"approval"* record of the local land office to ascertain what has approved there. We find this language in the certificate of the local register and receiver who, after reciting the accuracy of said limits, continued, "and further certify that the filing *of said list* is allowed and approved; that the whole of said lands are surveyed public lands and within the limits of twenty miles on each side; that the same is not (nor is any part thereof) *returned* and denominated as mineral land, etc. * * * "

This court will note there was no approval of any land, even by the local officers; that the "local approval" only extended to the filing of the list, coupled with a statement that the land had not been returned (by the surveyor general) as mineral land and was

within certain limits. *That* is the only record, finding, decision or determination by any office or officer of the government that antidated the issuance of the patent and the defendants are claiming lands under such a record worth a *half a billion of dollars* and is exceedingly worth that on such a record and under all the circumstances any one should dare to question its illegal and dishonest claims and pretensions.

So after all is said and done the question really resolves into a construction of the patent and in that connection this thought occurs to us, *It is conceded, it is established, and that beyond any question, that if A should convey to B, by grant deed, six hundred and forty acres of land, excepting the mineral therein, or any subdivision thereof, in which mineral should thereafter be found, that such an exception would be valid and that the grantor of his administrator, executor or assign could at any time thereafter, even a thousand years thereafter, enforce the exception. (Maxwell etc. v. Dawson,* 151 U. S. 586, 604; *Cox v. McClure,* 71 Conn. 729; *Stockton v. Morris,* 39 W. Va. 432; *Greenleaf v. Birth,* 6 Peters 302; *Painter v. Pasadena etc.,* 91 Cal. 74.)

Now if it follows that a patent of the United States to land within California is subject to the same rule of construction that applies to an excepted deed between individ-

uals, it will also follow that the contention of the appellees is without force in such connection.

When Mr. Justice Fields was chief justice of the Supreme Court of California he passed squarely on the question and, backed unanimously by the concurrence of his then associates on the bench, said:

> "The United States occupy, with reference to their real property within the limits of the state, only the position of a private proprietor, with the exception of exemption from state taxation, and their patent of such property *is subject to the same general rules of construction* which apply to the conveyances of individuals. From the operation of conveyances of this nature, that is, of individuals, the minerals of gold and silver are not reserved *except by express terms.* They pass with the transfer of the soil in which they are contained—and the same is true of the operation of the patent—the instrument of transfer of the governmental proprietor, the United States; no interest in the minerals remains *in them without a similar reservation.*"
>
> *Fremont v. Fowler,* 17 Cal. 225.

And the case has been acted and approved many times. *(See Sheppard's California Citations)* both in state and federal courts.

The defendants are forced necessarily to this conclusion, namely, that it being the antecedent duty of the land department to primarily decide the quality of the land

that the *issuance* of the patent creates the *conclusive presumption* that such duty was performed and that we are precluded from searching the antecedent record or from proving that there was no antecedent record. We allege they did not comply with the act of congress, the patent shows conclusively they failed to comply with the law but still the court is asked to presume that what they did not do they did do because the law said they must so do.

2. To predicate such a contention counsel ambiguously contended that they complied with the regulations of the land department, so far as they were concerned and even if such claim was true, as their demurrer admits was not, they would be in no better position as this court in *Turner v. Sawyer,* 150 U. S. at page 587 said:

> "* * *; nor do the regulations of the commissioner of the general land office, whereby a party may be held to prove his better claim to enter, *oust* the jurisdiction of the courts of justice. We announce this to be the settled doctrine of this court."

3. The converse of such proposition is that if the patent was issued in violation of law and of the rules of the department that the patent is not conclusive.

It must be conceded by counsel that if the land department (1) has the

right and power to make rules for the regulation of its business and procedure; (2) that such rules have the force and effect of law; (3) that the department is bound by its rules during their continuance; and (4) that the violation of a rule of the department amounts to a violation of law. The courts (this court) have held that a person may be convicted of crime and punished for a violation of a rule of the land department, and if a penal liability will follow a violation surely a civil liability will follow in the wake of a violation not only of a duty *imposed* by law on the land department, but of a duty prescribed and regulated by its own rules and procedure. The court will remember that the patent issued on July 10, 1894, and that the rules going into effect July 9, 1894, referred to by Secretary Hitchcock in 32 L. D. 341, did not apply to the patent in controversy except in the particular of proof, and if they did, so much the worse for the defendants, for not one of those rules was complied with by the department previous (or at any time) to the issuance of the patent, and neither did the department comply with the law of "primarily determining" the quality of the land nor with any of its rules and regulations. Judge Ross apparently did not pass on this point, and the appellees, struck by the force of the argument, contended that appellant could not avail himself of the point because he did not specifically allege in his bill that the rules of the

land department then in existence had been violated.

The bill charges and the demurrer admits such fact, and in all the cases that may be cited by the defendants it is affirmatively stated over and over again that under the law it is the duty of the land department to "primarily determine" before issuance of patent the quality of the land, and the demurring defendants admitting there was no such primary determination it follows that the excepted patent issued in violation of law and is void. (112 U. S. 24; 89 F. 811; 189 U. S. 54; 109 U. S. 205; 156 U. S. 494; 200 U. S. 71.) It will be remembered the appellees filed only a general demurrer, and the bill specifically alleges that the patent issued without *primary determination of the quality of the land, and that there had been no hearing or decision in the land office,* which is a statement of the fact and is better pleading than to allege that the patent issued in violation of law or in violation of the rules and procedure of the land department, which in any event is merely a legal conclusion.

That a patent issued in the manner indicated is void is fully approved in *Moffat v. United States,* 112 U. S. 24; *Kirwan v. Murphy,* 189 U. S. 35; *Whiteside v. U. S.,* 93 U. S. 247; *Hume v. U. S.,* 132 U. S. 406; *Niles v. Cedar etc.,* 175 U. S. 300, and we call the attention of the court to the citations in connection with our

own contention that a patent is only conclusive of the matters actually passed on and decided prior to its issue.

Mr. Justice Van Derventer, when at circuit, speaking of the rules and regulations of the land department in *Leonard v. Lennox*, 181 Fed. at p. 768, said:

> "*Of the contention* that the local land officers waived compliance with the regulation by not insisting thereon it is enough to observe: First * * * and, second *that had they been charged* with the duty of passing on such applications, they *could not* have waived compliance with the regulation *because* it had the *force of law* and was no less binding on them than on the applicants"—

In that case the *proof* in the land office covered all the requirements except as to the non-saline character of the land and B contended that for such reason the patent *was not conclusive* and A in reply contended that such proof was unnecessary as the *surveyor's* return showed the land was not saline, just as it is contended here that the surveyor's return shows the land covered by the patent was non-mineral but if we may not go to the antecedent record, as contended by the defendants, such contention is futile—In such connection and in the same case at p. 768, Mr. Justice Van De Venter said:

> "* * * it is next urged that in this instance compliance with the reg-

ulations (of the land department) was not necessary because the land, when surveyed, was noted upon the surveyor's return as being agricultural in quality and not saline.

Passing the fact that the surveyor's return, which was made fourteen years before the application (and our survey was nearly 30 years before the patent issued) would afford no information in respect *to determining* discoveries, we think the contention is foreclosed by the decision in *Barden v. N. P. R. R. Co.*, 154 U. S. 288, where it is said:

"Some weight is sought to be given to the allegation that the lands in controversy are included in the section which was surveyed in 1868 and a plat thereof filed by the surveyor in the local land office of that year, from which it is asserted that the character of the land was ascertained and determined and reported to be agricultural and not mineral—But the conclusive answer to such alleged determination and report is, that the matters to which they relate *were not* left to the surveyor general—Neither he nor any of his subordinates were authorized *to determine finally* the character of any lands granted or make any *binding* report thereon —Information of the character of all lands surveyed is required of surveying officers, so far as knowledge respecting them is obtained in the course of their duties: *but* they are not clothed with authority to *especially* examine them: nor does their report have any binding force—It is simply an addition made to the general information obtained from different sources on this subject."

II.

The discussion under this point has proceeded, on our part, under the theory that *we were not making a collateral attack on the patent* but were upholding the same as it was written under the record on which it issued. Of course it is difficult for us to conceive how our suit may be classed as a collateral attack—A collateral attack requires the *specific* attack in some finding of fact in another suit or proceeding and there was no finding of fact it necessarily follows that this suit may not be classed as a collateral attack—

An attack on a judgment valid in its face under the charge that it had been issued wholly without a witness sworn, a fact proved, without pleadings or parties, counsel, etc., would not be a collateral attack. It would, like our suit in that instance, be a direct attack. If we set up some testimony given in the land office and then here attempted to prove its falsity then our attack would be collateral and we would be precluded. It maybe that the court below, that is a member of the court, concluded the attack was collateral because we alleged the falsity of the Madden application to which there was no special demurrer or motion to strike. The Madden application stated the lands "are vacant, unappropriated," etc., while as a matter of fact the

lands were occupied under a valid mining location. If there had been subsequently any actual decision that the lands were "vacant, unappropriated and non-interdicted mineral lands," then this suit might be classed as a collateral attack. The only statement made by the land department was "that the lands fall within the twenty miles lateral limits of said route, and that the said lands, *so far as the records of the general land office show,* are free from conflict," etc. Now if that be a primary determination that the lands were (1) non-mineral, (2) vacant, (3) unappropriated, this suit would not even then be a collateral attack, but a direct attack based on a mistake in law in issuing the patent on such a record. The contention in the courts below by counsel that we were making a collateral attack on the patent was based solely on the proposition that because we contended that the patent issued in the presence of the prior locations and without an antecedent determination that we were making a collateral attack while we contended that, in such instance we were making a direct attack. Counsel contended that we contested their theory that the court must presume there was no prior location, that there was no antecedent or primary determination, that we were making a collateral and cited nearly a hundred cases in which every instance the contestant was alleging perjury, etc., in the evidence that resulted in a definite ante-

cedent determination. We do not allege that the patent was issued on *false testimony;* we allege it issued without testimony or judgment, and that is the difference between a collateral attack and a direct attack. If our relocation placed us in privity with the paramount title, then we can maintain any suit in regard to the title that could be maintained by the United States, either on our behalf or in a wholly independent action. So while disclaiming that we are making any collateral attack, we will, out of our deference for the court below, try to show that, under the circumstances, this attack must be sustained even if classed as a collateral attack on the presumption of regularity attending patent.

At the outset we assert it to be an elementary proposition that needs no citation, that no process, judgment, decree or patent is attended by the presumption of regularity in its issuance unless the papers on its face is regular and bears the impress and carries the language of regularity.

An ancient will, deed, or other document regularly executed may be received under the presumption of regularity and due execution if it carries such impress, but if on its face it shows lack of conformity with the statute, as our patent shows lack of prior determination, then it would be worthless.

Once the presumption of regularity is broken down in this suit the defendant corporation is stripped of defense and stands naked at the bar of justice.

The crime of the century will be wholly revealed, the plundered treasury of the government will be replenished and even at that the defendant corporation will not be crippled or harmed, for nearly a million of acres of now idle and vacant land resting under the shadow of so-called S. P. patents will be restored to the public domain, then developed, turning hundreds of millions of dollars into circulation in the territory of the defendant corporation, and if the Southern Pacific Railroad Company would cease playing the dog in the manger and permit the development of California it would enhance the assets of corporation many fold.

The defendant corporation has greatly enhanced its values since the few years it was relieved of the political control of California and permitted by the people to wholly devote its time to the carrying of freight and passengers and when it quits trying to control the mineral development of California through its dummy corporations it will have still more time to devote to passengers and freight and nothing stands before such consummation, devoutly to be wished, but the invoked "presumption of regularity flowing from the issuance of a piece of paper

with some words and figures with plenty of blank spaces for the insertion of the imagination, space for this court to write in that the land is more valuable for agriculture than for mining, that it is not the richest mineral land in the world, that thousands of wells are not spouting their riches from those "agricultural" lands, that there were no prior locations, no prior mining claims, that the Madden application was true, that there was an actual decision in the land office that the lands were vacant, unappropriated, non-interdicted mineral lands and that the solemn agreement between the United States and the defendant railroad company that the mineral exception should be inserted was a "wrong" to the poor innocent Southern Pacific Railroad Co., led into a pitiable condition by that erstwhile missionary, Collis P. Huntington, that is what must be done under the presumption of regularity and just such presumptions or claims of such presumption in favor of predatory wealth and "Big Business" is the cause of the political upheaval in which the platform of one political party is, "You are a thief," and the other is "You are a liar," and the consequences of which will be relegation of political corporations to the strict performance of the functions for which they were organized.

The writer of this brief strictly understands that only questions of law should be argued here, but necessarily law must

be based on morality and honesty and courts must necessarily take cognizance of what is known to the man on the street. Every man in California knows in his heart that the Southern Pacific Railroad Co. has "taken" the oil lands under the "presumption of regularity" and is invoking the statute of limitation in contemplated civil actions, and what is worse, until recently, but few men in California thought the defendant corporation could be fought successfully and successfully brought to justice. Standing at the bar of justice the defendant confessedly, without equity, without justice in its claim, without even a single meritorious defense, asks this court to presume everything in its favor, even in the face of its demurrer and the record. The defendant corporation failed even in its practice. Such questions as are raised herein by the defendant railroad company under a general demurrer and now recognizing its dilemma insists that the demurrer is not an admission on its part of the existence of the prior mining locations or an admission on its part of the lack of the primary decision *or an admission on its part that it assented and agreed that the mineral exception should be inserted in the patent and should be binding.* It argues that the demurrer admits only what is well pleaded and claims generally nothing is well pleaded except possibly its general demurrer. If it were dissatisfied with the bill of complaint a special de-

murrer or a motion to strike might have changed it somewhat, but at best the demurrer interposed raises no question at all except possibly the general want of equity and of jurisdiction, but to claim now that the general demurrer does not admit the existence of the prior locations, the forfeiture of the same, the relocations and the issuance of the patent in the presence of the prior locations needs no citation of authority for refutation and justifies an attack on the patent on the theory it is void.

As the question certified to this court asks if a collateral attack may be made on a patent so written and so issued we will endeavor to show this court that such attack, under the circumstances, is permissible and we will discuss the subject *independent* of all other questions and propositions involved in this controversy.

This court must remember, however, that the question certified to this court *necessarily refers* to the patent before it *and not* generally to patents made up in due form, with proper recitals and statements and in discussing the question we leave out everything except the patent in controversy, avoiding all reference to want of antecedent record or the mineral exception and strictly confining ourselves to the patent *as it is written* and therefore the *concrete* question arising, "is the patent in contro-

versy, *as it is written*, (1) a conclusive and official declaration that the land is agricultural and (2) that all the requirements preliminary to the issuance of the patent have been complied with?"

In regard to (1) it must be remembered, as will be plainly seen from the debates in congress on the general question of railroad land grants, that the mineral exception was inserted in the respective grants for two purposes, (a) that mineral lands should not and could not pass to the railroad grantees, and (2) that those self same lands, mineral lands, should be reserved for the argonaut, the miner and prospector as at no time since the establishment of the government has the United States ever used any of the public lands for public uses but has reserved them in every instance for the use of its citizens except a few acres here and there for some military use or naval base, etc. (137 U. S. 170.)

Our basic text that such a patent as ours is not conclusive on a collateral attack is taken from the *Barden case* and reads as follows:

> "The fact remains that under the law the duty of determining the character of the lands granted by congress, and *stating it in instruments transferring the title of the government* to the grantees, reposes in officers of the land department. *Until such patent is issued, defining the character of the land granted and showing that*

it is non-mineral, it will not comply with the act of congress in which the grant before us was made to plaintiff. The grant, even when all the acts required of the grantees are performed, only passes a title to non-mineral lands; *but a patent issued in proper form,* upon a *judgment* rendered after due *examination* of the subject by officers of the land department, charged with its preparation and issue, that the lands were non-mineral, would, unless set aside and annulled by direct proceedings, estop the government from contending to the contrary, and as we have already said in the absence of fraud in the officers of the department, would be conclusive in subsequent proceedings respecting the title."

It is impossible for us to state the legal proposition in clearer language; it is the law as announced by this court—the final interpretation of authority, and it may only be avoided by finding by this court now that it *is not the law!* and that this court was amiss in the *Barden* case.

The statement is clearly made that until such patent is issued, *defining the character of the land* and *showing* it is non-mineral *it will not comply with the act of congress.* How could the patent *define* and *show* the character of the land except by statement and recital? Under this ruling the officers of the land department failed to *comply* with the act of congress and such lack of compliance renders the

patent void and subject to attack. No presumption of regularity attends the patent at this point and if the *Barden* case has any force or value this court must now hold the patent void or reverse the *Barden* case as the language of this court in that case admits of no compromise. Either the *Barden* case is not controlling or the patent is void.

Counsel in the courts below contended that the defendant railroad company had no voice in the form of the patent issued but Mr. Justice Fields in *LeRoy v. Jamison*, 3 *Saw'y* 369, said:

> "No one can be compelled by the government to become a purchaser or *even* to take a gift. *In order* that the patent of the government may take *effect as a conveyance so as to bind the party to whom it is executed* and transfer title to him, it is essential *that it should be accepted*. The *acceptance* by the grantee of the conveyance where no obligation is imposed will always be presumed in the absence of express dissent whenever the conveyance is placed in a condition of acceptance."

This court will note the language of Mr. Justice Field, "So as to bind the party to whom it is executed." Later we will refer to the subject.

The bill of complaint herein alleges the express acceptance of the patent by the Southern Pacific Railroad Company, to-

gether with all its terms and conditions and its demurrer necessarily admits the fact, and the subject is fully discussed later in this brief.

In attempting to meet the rule laid down in the *Barden case* that until "such patent issued, *defining* the character of the land granted," etc., they insisted that the word "it" meant the "land department" and not the "patent"—the case reads "until *such* patent is issued *defining* the character of the land granted and *showing* that it is non-mineral *it* will not comply with the act of congress in which the grant before us was made to plaintiff," the extraordinary argument is advanced by the Southern Pacific Railroad, realizing the deadly and controlling force of the *Barden rule,* that *"it"* refers to the *"land department"* and not to the *"patent."* Even the defendant railroad realizes that only by reversing or misconstruing the *Barden case,* even to the point of absurdity, may its cause be saved and hence the whimsical argument as above was made in the Circuit Court of Appeals.

It is only by such illogical, absurd and ludicrous construction may it be made to appear that the defendants have a shadow of claim to the lands in controversy which they are not claiming through the *"land department"* but through the *"patent"*—such construction in italized words was claimed by the defendant at p. 106 of their brief and argued and in-

sisted on in the Circuit Court of Appeals, and before Judge Ross.

Well, suppose, for the sake of the argument, that *"it"* does refer to the *"land department"* and not to the *"patent"*—how does *"it"* help the defendants if the land department *"did not comply with the act of congress"* in issuing the patent, as in such event the patent would be absolutely void.

Surely if the land department issued the patent in violation of law the patent must be *void and not* voidable, and a collateral attack is justified! No complaint is made at this point by the defendants that the rule of the *Barden case* is another expression of *obiter dictum* as they cited the rule time and time again throughout their brief and in their arguments in the courts below and we are content they should impale themselves on either horn of the dilemma!

In the *Eureka case* Mr. Justice Fields said, (in a collateral attack):

> "It is only where an adverse party was required to adverse and fails, that the presumption of regularity arises and when no opportunity is presented to adverse the rule necessarily fails."

And in *Wright v. Roseberry*, 121 *U. S.* 519, this court said, (in a collateral attack):

> "The doctrine that all presumptions are to be indulged in support

> of proceedings upon which a patent issued and which is not open to collateral attack *in an action of ejectment*, where it is shown that the land in controversy had, before the initiation of the proceeding upon which the patent issued, passed from the United States."

And in the same case the court said that swamp land cases were analogous to railroad land grant cases, and we insist that the presumption of regularity never runs in a direct action in equity where there is an express attack on such presumptions; it only flows in actions at law where an attack is made on some finding of fact made in another action.

That is the case here; owing to the prior uncancelled mining locations, validly existing at and before the time of the initiation of the railroad application for patent, the lands had passed away from the United States in so far as their disposal was concerned, and we shall hereafter show under *"question six"* that title so outstanding or those lands *have never passed back to the United States!*

It must be conceded, we think, that the *patent on its face* shows it was not issued in a manner substantially *regular* and therefore it *cannot* be presumed that formal requisites for its validity were complied with. (*Ste. Dig. act* 10; *Fay Ev. Sec.* 124; 1 *Gr. Ev. Sec.* 20; 2 *Whar. Ev. Secs.* 1302-1309; *Applegaith v.*

Lexington, 117 *U. S.* 255, 264; *Adams v. Coroles*, 95 *Mo.* 501; *Hogue v. Corbit*, 156 *Ill.* 540; *Berrengberg v. Boston*, 137 *Mass.* 231; *and note*, 1 *Elliott Ev.* 99), and in connection therewith the following citation from *Reynolds Trial Evidence*, *Sec.* 81, is cited by us, as applicable to the situation:

> "But where a court exercises a special or limited jurisdiction under a special statute prescribing the occasion and mode of its exercise, no such presumption (of regularity) arises, but, on the contrary, the proceedings must be fully set forth in the *record* and they will be held *illegal* unless it appears therefrom affirmatively that all the facts requisite to confer upon the court the jurisdiction it exercises were duly *alleged and proved*. (*Thatcher v. Powell*, 6 *Wheat.* 119, 127; *Hall v. Howd*, 10 *Conn.* 514; *Tracy v. Roberts*, 88 *Me.* 310, 316; *Warren v. Bank*, 157 *N. Y.* 259-276; *Willamette Co. v. Hendrix*, 28 *Org.* 485.) It must be remembered that all jurisdictional facts necessary to entitle a plaintiff to the benefit of a special or statutory proceeding must be proved by competent legal evidence in a court before he can obtain a judgment in such proceeding. *Ex parte* affidavits required as a preliminary to the issue of process are not legal proof that the facts alleged in such affidavits are true and the proof of the truth of such facts are as much a judicial *requirement* as is the filing of the affidavits, so that plaintiff cannot succeed, if he fails to provide such proof at the trial—while in suits strictly *inter partes* jurisdictional facts may generally be proved by mere admission made in the

> pleadings or otherwise, or even by failure of the defendant to deny such facts when alleged by the plaintiff, but *this* is not the case in proceedings *in rem* where the purpose is condemn property seized *or determine the status of a person or thing* for it would be most unjust that the rights of persons not duly summoned to appear before the courts should be injuriously affected by the mere statements of others not made under oath or subjected to the test of cross-examination."

Does such rule apply to the land department and to *ex parte* applications for patent? In this suit the patent issued, it is claimed by the complainants, on an *ex parte* application, based on the *ex parte* affidavit of *Jerome Madden*, the land agent of the defendant railroad, which is the *record* base of the application and all subsequent procedings culminating in the patent.

This court in *Burfenning v. Chicago, etc. R. Co.*, 163 *U. S.* 321-323, said:

> "Whether, for instance, a certain tract is swamp land or not, saline land or not, *mineral land or not*, presents a question *of fact not resting on record, dependent on oral testimony*,"

and the question arises as to what this court meant when it used the language cited. This court in that case distinctly said that the determination by the land department of the mineral quality of land sought to be patented presented a question of fact *not resting on record* and it could only

mean the *record* contained in the land office, contained in its books, maps, records, surveys, and reports which the court said is not sufficient but the determination of such fact is dependent *on oral testimony.*

There can be no dispute concerning what is meant by "oral" testimony—an *ex parte* affidavit may never be classed as "oral testimony."

The action in the cited Burfenning case was one where the plaintiff claimed under a patent from the United States, dated June 13, 1884—the defendant claimed the patent was void because the patent covered lands "included within the limits of an incorporated * * * city," and this court said:

> "The case of *Morton v. Nebraska,* 88 *U. S.* 660, is very closely in point. In that case the plaintiff held a patent void for lands in Nebraska which were *saline* lands and *noted* as such in the plat books, although the notes thereof had not been transferred to the register's general plat."

And then this court went on to say that a patent obtained under such circumstances was not conclusive and said:

> "In that case it will be observed that the *records* (of the land department!) disclosed that the lands were *saline* lands when the proceedings in the land department *were had.* So the case *was not one in which the department determined a*

fact on parol evidence, but one in which it acted in disregard of an established and recorded fact. * * * This is not a case in which the patent was *founded* upon actual occupancy for homestead purposes, or in which *nothing* appearing but the patent itself there might be some uncertainty as to the time at which the patentee's rights were initiated, *whether* before or after the incorporation of the city. It is one where, affirmatively, *and by the record,* it is disclosed * * * and in that respect differs from *Texas, etc., v. Smith,* 159 *U. S.* 66, in which, *on account of the absence of all testimony* there was suggested an uncertainty as to the time at which, by way of relation, the patentee's rights took effect."

Now, we submit, that when this court said that the determination of the question whether the land was mineral or not is dependent on *oral testimony,* it means at any rate that only a question of *law* was decided by the land department when it concluded to issue the patent, not issued in due form, with recitals and statement of the quality of the land is not conclusive, on the record existing in the general land office.

Colburn v. N. P. R. R. Co., 164 *U. S.* 383.

In the *Colburn* case the defendant railroad company, in that action, was sued for damages for failure to *convey* a legal title to certain premises which the railroad company had contracted to convey to plaintiff. The

plaintiff further alleged that the railroad company did not have a legal title as *in certain other proceedings,* (to which plaintiff was not a party) the secretary of the interior *decided* that the land did not pass under the land grant to the railroad company, but was subject to entry and patent under the general land laws of the United States.

In that contest in the land office the railroad company was a party and the railroad company in its answer alleged, amongst other things, that in the contest in the land department the secretary of the interior had decided that a prior locator by reason of cultivation and occupation had created a claim which he could have perfected under the public land laws and therefore the land was excepted from the railroad grant. There was a decision in favor of the plaintiff in the state courts and on writ or error here this court said:

> "On the merits of the case it may be observed that the burden of the decision of the Supreme Court of the state is that because the land department *had decided adversely* of the claim of the railroad company and *because no direct proceedings had been had to set aside the decision, it was conclusive against the company.*
>
> "In this we think the learned court erred. The facts set up in the answer in reference to the land grant, the filing of the map of the general line of general route, and also of definite location, the situation of the land and its freedom, from

> *record claims*, were such as to *prima facie* vest a title in the railroad company. It is true it is also disclosed by the answer that one Kelly was in occupation or at least collaterally the land at the time of the filing of the map of definite location and the decision of the land department as to that fact undoubtedly concludes both parties, * * * and while the decision of that fact might be conclusive between the parties, his ruling of such occupation and cultivation created a claim exempting the land from the operation of the land grant, *is a decision on a matter of law* which does not conclude the parties, and which is open to review in the courts."

And then this court, pointing out that the act of congress operated to pass the *fee* of the land *independently* of the issue of the patent, said that even if a patent had issued, which had not, *it would not have been conclusive even in an action at law*, and concluded by saying:

> "For the reasons above indicated, because the decision of the land department was only on matters of fact *and did not conclude* the law of the case, and *because* such facts so found *were not of themselves sufficient* to disturb the title of the railroad company, the judgment is reversed, etc."

The case of *Johnson v. Drew*, 171 *U. S.* 93, cited and much relied on by counsel in the courts below, is absolutely in our favor in every detail. The case simply held that a patent could not be avoided by one in prior possession *who had not complied with the law, who*

never took any steps to secure a title, and then this court continued: "But whether a party was or was not in possession * * * is a question of fact, *dependent on parol testimony,*" and then follows the above citation found in the cited case of *Burfenning v. Chicago, etc.*, 163, *U. S.* 321.

In a statement of the case of *Johnson v. Drew, supra,* made up by Mr. Justice Brewer, it appears "the patent to plaintiff was issued * * * *and recited* that it was upon a location of Valentine Script," and the entire holding of the case simply was that a *squatter* on public lands who had made no entry nor *"took any steps to secure a title"* could not maintain any action to eject a subsequent patentee *who had complied with the law.* This court will note that the patent contained full jurisdictional recitals as will be seen by a reference to the patent which is recorded in the general land office.

What a Patent Must Contain to Render it Conclusive.

The contention of the defendants in the courts below was based entirely on the observation of the circuit judge in *King v. McAndrews,* 111 *Fed.* 870, that the *"patent is the judgment"* of the land department, while we contended that when this court said in the *Steele case,* 106 *U. S., "that the patent is the result of the judgment"* that the contention of the defendants

was entirely refuted in such regard and when it *affirmatively* appears there had been *no judgment* at all in the land department that the patent, issued without a judgment, was not conclusive! A deed in an action to quiet title, made up and issued by the clerk of a court would, in the absence of an antecedent judgment rendered by the court, not be conclusive in a collateral attack when the rule of *res adjudicata* was invoked and the same rule applies, we submit, to a *patent* illegally issued without an antecedent judgment, and, in any event the patent would not be conclusive *unless so made up and so recited as to render its recitals conclusive,* as otherwise the rule of *res adjudicata* as stated by Mr. Justice Van De Venter, *supra,* would not apply.

None of the cases cited by the defendants in this regard hold that the *patent is conclusive* but they hold as pointed out in *Johnson v. Drew,* 171 *U. S.* 93, and all the other cases on the subject that the *decision* (judgment) rendered on *oral* testimony as to whether land is mineral or not is a question of fact, and that such decision, rendered on *oral testimony,* is not open to relitigation and is conclusive except in cases of fraud, etc."

A patent that is issued as the result of an antecedent judgment as pointed out in the *Steel* case is conclusive in an action of ejectment and if the *jurisdiction facts and state-*

ments as to the quality of the land be not set forth in the patent we would necessarily be forced to go to the antecedent decision or judgment to ascertain what title, if any, be carried by the patent! Even Mr. Lindley, cited by defendants, speaks of the patent as the result of an antecedent judgment as in Sec. 161, it is stated, speaking of the land department, says, "has jurisdiction *to determine* the character of the lands *and its decision culminating* in the issuance of a patent is *conclusive,*" and the meaning of the word "culminating" in this regard is well defined. It means "the result of antecedent action, of antecedent determination, of antecedent judgment," or it means nothing.

Counsel in the courts below tried to avoid the force of the rule, saying that we were contending that if a homestead applicant made his application, furnished his non-mineral affidavit and received his patent, that we contended that if no one appeared in that proceeding to contest his right and if subsequently mineral is found his patent could be collaterally attacked, or putting it in another way, as they said, "Every patent that is issued without a land office contest would be subject to collateral attack!" Of course we made no such absurd claim or argument. The law provides a way in which a homestead applicant must obtain his patent and if the law be followed and a patent issue that ends

the matter for all time as the applicant, like a mining locator, *claims* under a general statute and the land department is authorized to point out the procedure which must be followed and no mere irregularity in the procedure would permit a stranger to the title and a stranger to the proceeding to set up such irregularity in a collateral attack. A person in touch with the antecedent or paramount title could, however, impeach the patent in any form of action, in which it was offered against him provided, the homestead applicant had not given the *notice* of such application that the law requires. If a homestead applicant knowingly or unknowingly took up land known to be mineral at the time of his application his patent would avail him naught, if otherwise the land was known to be mineral. It is just as pointed out by this court in *Vance v. Burbank*, 101 *U. S.*, when this court said, as was pointed out in *U. S. v. Minor*, 114 *U. S.* 243, (the first a collateral, the second a general attack.)

That *was* not a suit by the grantor, (the United States), to set aside the patent, but by a party, or the heirs of a party who *had* contested the right of a patentee before *all* the officers of the land department up to the secretary of the interior, and had been defeated, and where the whole question depended on disputed facts, the evidence of which facts was submitted by the contestants to those officers. In such a

case, where there was full hearing, rehearing and issues made up and tried, the observation of the court *"that the decision* of the proper officers of the department is in the nature of a judicial determination of the matter in dispute," *is well founded."*

In the second place there is no analogy between a homestead case and this suit for the reason that this suit is *based* on a mining relocation arising through a forfeiture of a prior location, under a general statute, the mining laws of the United States.

Such a location could not be made in an instance where a homestead applicant was in actual possession of his land, that is, not until his entry had been *cancelled* after notice and hearing, and the law points out a way in which, in a proper instance, a homestead entry may be cancelled in the *land office* at the instance of a contesting mining locator or relocator.

Where the patent issued to such a homestead applicant it would either be (1) regular, in which no one, not even the United States could attack it, or (2) voidable, in which only the United States or an antecedent title could attack it, or (3) void, in which instance it might be attacked *by any one in any form of action.*

If the patent in such instance issued without recitals of the jurisdic-

tional facts, an antecedent record supplying the jurisdiction facts would be sufficient to maintain the title of the homesteader, but we are of opinion that if wholly without an entry, wholly without any record, wholly without any proof, and wholly without any jurisdictional facts, the secretary of the interior should hand to John Doe a patent for one hundred and sixty acres of land, already covered by existing, valid, perfected mining locations, he would not be able to retain or to legally secure possession of and title to such land.

This court must always bear in mind that we are not strangers to the title or do we lack privity with the title as will be pointed out conclusively and elsewhere in this "brief."

So we say, if the law be followed in homestead cases and the regular *statutory* procedure followed, the patent containing proper jurisdictional recitals will be conclusive just as a proper patent in this instance would have been conclusive and that brings us to the concluding part of the argument under this point, namely:

"What Must a Patent Contain to Render it Conclusive on a Collateral Attack?"

1. It will be noted that homestead patents contain a recital "that pursuant to the act of congress, approved May 20th,

1862," to secure homesteads to actual settlers in the public domain, and the acts supplemental thereto, *the claim of John Doe has been established and duly consummated, in conformity with law*, etc., etc., and then the patent proceeds with the terms of description * * * and also "subject to the right of a proprietor of a vein or lode to extract and remove his ore therefrom should the same be found to penetrate or intersect the premises hereby granted." There is no provision in the homestead act "authorizing" the insertion of such an exception, and while more than, probably, a *million* of homestead entries have been made, *no court* has declared the "ore" exception to be nugatory or void!

2. The patent in preemption cases recites the congressional act, that the ground had been purchased and *"which tract has been purchased by John Doe"* and the patent proceeds to terms of description and carries a similar reservation concerning the right of removing ore, etc.

3. *The swamp land patents carry full recitals,* and in *Wright v. Roseberry* this court pointed out that the swamp land act was analogous to railroad land grants in so far as the defining of the quality of the land was concerned.

4. The placer mining patents carry full recitals of entry and purchase

of described mineral lands, subject to five conditions and reservations.

The rules of the general land office in each of the above instances *require an antecedent decision and judgment concerning all the jurisdictional facts.*

Of course we are not standing on the right at this point to make a collateral or other attack on the patent under any theory that we are not or were not in privity with the paramount title at the time of the commencement of this suit and it will be necessary at all times, in so far as we are concerned in discussing the fourth and sixth questions certified to this court, to consider them jointly, for in answering the 6th question we conclusively establish our right, in any event, and independent of all other questions in the case to make, if necessary, a collateral attack on the patent and to establish that it is not an official and conclusive declaration that the lands are agricultural and of the kind contemplated by the grant by reason of our privity with the legal and paramount title of the United States.

THE SIXTH QUESTION READS: "DOES THE FACT THAT THE APPELLANT WAS NOT IN PRIVITY WITH THE GOVERNMENT IN ANY RESPECT, AT THE TIME WHEN THE PATENT WAS ISSUED TO THE RAILROAD COMPANY, PREVENT HIM FROM ATTACKING THE PATENT ON THE GROUND OF FRAUD, ERROR OR IRREGULARITY IN THE ISSUANCE THEREOF AS SO ALLEGED IN THE BILL?"

Court and counsel apparently agreed with us that we were in privity with the paramount title, in any event, subsequent to the issue of the patent, and at and since the time of our relocations, and the question apparently concedes so much and by implication asks if it was necessary that such privity exist *at the time of the issuance* of the patent.

This court will remember (1) the prior valid, subsisting recorded notices of mining locations remained in full force and effect from November, 1891, until March, 1909; (2) that forfeiture or abandonment may *never* be presumed *from mere lapse of time* but must be affirmatively proven, and in such connection we contend that the demurrer necessarily admits:

1. The making of the prior mining location, (2) their existence and continuance during the period between Novem-

ber, 1891, and March, 1909, with *continuous* and *uninterrupted* possession of the lands in controversy in the prior locators during that time and (3) the forfeiture of these prior locations and our relocations in March, 1909.

On such statement and the record it necessarily follows, we submit—

I. That even if the mineral exception be nugatory and void the paramount title of the lands in controversy by reason of the prior location was held by the United States in trust for the prior locators on the date of our relocation, and that the prior estate was in privity with the paramount title at the time of the issuance of the patent.

II. That if the mineral exception be valid the lands in controversy were a part of the public domain in March, 1909, and subject to location or relocation under the mining laws of the United States.

III. That even if the mineral exception be nugatory and void the paramount title of the lands in controversy by reason of the prior location was held by the United States in trust on the date of our relocation.

IV. That if the paramount title to the lands in controversy was held in trust by the United States on the date of the relocation, it remains in the United States, being held in trust for the relocators.

We submit that by reason of the relocations made by us in March, 1909, we have the equitable and possessory title and have the right to quiet our title in this suit under the paramount title against all who present adverse claims or titles.

We were not in privity with the paramount title until the moment of relocation, except possibly by way of relation.

Counsel did not argue that privity with the paramount title at the date of the issuance of the patent was essential, but they argued that the prior mining locations were extinguished or cancelled by reason of the issuance of the patent, and consequently we could not in presence of the patent obtain privity with the paramount title.

They said the court, in order to uphold the patent, would presume either that no locations had been made or, being made, had been abandoned. We therefore say:

LOCATING A MINING CLAIM PREDICATED ON THE DISCOVERY OF MINERAL AND RECORDING THE SAME AS REQUIRED BY RULES OF THE MINING DISTRICT WITHIN WHICH THE CLAIMS ARE EMBRACED CREATES AN ESTATE OF FREEHOLD WHICH CONTINUES UNTIL THE LAWFUL CANCELLATION OF THE LOCATION BY A TRIBUNAL OF COMPETENT JURISDICTION, OR UNTIL THE CLAIM IS ABANDONED OR FORFEITED AND IN SUCH LATTER TWO INSTANCES AND UNTIL SUCH TIMES THE LEGAL AND PARAMOUNT TITLE IS HELD IN TRUST BY THE UNITED STATES FOR THE PRIOR MINING LOCATOR.

In *Noyes v. Mantle*, 127 *U. S.* 349-351, speaking of the legal rights of a locator after location properly made under the mining laws of the United States, this court said:

> "The claim was thenceforth their property. They needed only a patent of the United States to render their title perfect and that they could obtain at any time upon proof of what they had done in locating the claim and of subsequent expenditures to a specified amount in developing. *Until the patent issued, the government had the title in trust for the locators or their vendees.*"

In *Haws v. Victoria Min. Co.*, 160 *U. S.* 303, this court said:

> "The possession under a claim established according to law, is fully recognized by the acts of congress *and patent*

adds to the security of the party in the continuous possession of mines he had discovered or bought."

In *Mery v. Brodt*, 121 *Cal.* 332, the California Supreme Court said:

"What is the nature and character of their holding, they being valid locators of mining claims? The locator of a mining claim under the laws of the United States has the right to the exclusive possession and enjoyment of that claim. *He has an estate of inheritance; he has a title which can only pass by deed.*"

And similar rulings have been made by all courts passing on the title of a mining locator. (See, in particular, *Belk v. Meagher*, 104 *U. S.* 279-287; *Nevada, etc., Oil Co. v. Home Oil Co.*, 98 *Fed.* 673; *Thallmann v. Thomas*, 111 *Fed.* 277.)

This court in *St. Louis Min. Co. v. Montana Mining Co.*, 171 *U. S.* 650, 655, held that where there is a valid mining location, *the area becomes segregated from the public domain* and is the property of the locator and in *Meydenbauer v. Stevens*, 78 *Fed.* 787, the court said:

"The effect of a valid location of a mining claim * * * *is to segregate or cut out the ground located from the public land; and until the locator either abandons his claim or forfeits it* by the nonperformance of the annual assessment work,

the same ground cannot be located or possessed by another person."

And the same rule is reiterated in *Manuel v. Wulff*, 152 *U. S.* 510; *Forbes v. Gracey*, 94 *U. S.* 762; *Black v. Elkhorn Min. Co.*, 163 *U. S.* 445; *Gwillim v. Donnellan*, 115 *U. S.* 45; *Clipper etc. v. Eli etc.*, 194 *U. S.* 220-226, *and not even the United States may prevail against the title of a mining locator.*

THE TITLE SO CREATED REMAINED IN FULL FORCE AND EFFECT, EVEN AGAINST THE UNITED STATES, UNTIL CANCELLATION, FORFEITURE OR ABANDONMENT.

(a) Forfeiture does not ensue for failure to comply with the law relating to the performance of the annual labor; *as* between the locator and the United States *it matters not* whether the annual labor be performed; it requires the intervention of a third person and the *relocation* of the ground before forfeiture may arise. *The right of the original locator is terminated* only by the entry of a *new one* or by cancellation in a proper proceeding in the land office *founded on notice* to the original locator.

Little Gunnell Co. v. Kimber, Fed. cases, 8402;

Beals v. Cone, (a noted case), 27 Colo. 473;

Barkalege v. Russell, 29 *L. D.* 401;
Iron S. Min. Co. v. Campbell, 135 *U. S.* 286;
Marques v. Frisbie, 101 *U. S.* 476;
Quinby v. Conlan, 104 *U. S.* 420.

(b) NO PRESUMPTION OF ABANDONMENT ARISES FROM THE LAPSE OF TIME; THE ABANDONMENT MUST BE AFFIRMATIVELY PROVEN.

Therefore it affirmatively appears and must be taken as the undisputed fact here that at the time of the application of the defendant railroad company for a patent *that the land in controversy* was not a part of the public domain, over which the United States had jurisdiction to patent to the defendant railroad company. The rights and estates of the prior mining locators were definitely fixed and they had fully complied with the requirements of the law.

The only answer made by the demurring defendants to this proposition is that the claims of the locators were not pending in the local land office at the time of the filing of the map of definite location and we submit that such a contention is simply absurd—we have shown (1) the making of the locations, (2) the recording of the same in the office of the recorder of the Coalinga Mining District and which district embraced the lands in controversy—That

made complete compliance with the law—No filing or recordation of mining claims in the local land office is required or permitted by law.

The Locator, just as he pleased, might or might not apply for a patent: a patent added little, as this court has said, to his title—If he finally concluded, for any reason that appealed to him, to apply for a patent, his claim on such application would at some time appear in the local land office and *could not* appear before that time—

Counsel devoted much time and space in the courts below in claiming and arguing that the prior mining locations had no binding force because they were not pending in the local land office but we consider further comment unnecessary, and especially so as this court has said in the *Barden* and *Sanders* cases that such a view is untenable and that the right to make a mining location in case of railroad land grants after the filing of the map of definite location *is the one right reserved out of the grant.*

So it must be conceded that the patent to the Southern Pacific Railroad Company did not carry the title of the United States to the defendant railroad company as it had no title that it could part with except to the mining locators and the situation arose, the prior mining locators held and maintained their estates

until the same were forfeited to the plaintiff and his co-relocators on the 2nd day of March, 1909.

Counsel attempted to intimate that it did not appear that the prior mining locators had not continued in continuous possession of the mining claims and that the court in order to uphold the mining patent would presume that possession had not been continued and that the claims had been abandoned—Such a contention is, for the following reasons, futile:

1. "Where a statute speaks of parties in possession of a mining claim *it means a constructive possession which the law attaches to the title.*" *Heinze v. Butte etc.*, 126 F. 1, and cases cited which include decisions of this court on the subject.

2. A person may be in legal possession of a mining claim though not personally on the ground at the time of a stranger's entry. *Davis v. Dennis*, 85 P. 1079.

3. *Abandonment cannot be presumed from lapse of time.*

It appears in the bill of complaint that on the 2d day of March, 1909, the complainant and his co-locators went upon the land and ascertaining that the prior locators had not performed the necessary annual labor as required by law, exercised, as they had a right in

such instances, a forfeiture and *relocated the lands* under the mining laws of the United States.

The prior locations were made on a contemporaneous discovery of mineral and the relocators, independent of any discovery on their part, had the right to base the relocations on the antecedent discovery of mineral by the prior locators and as a matter of fact and of law to base their new estate of freehold and interitance is based on a discovery that was the *base* of the prior estate of freehold and inheritance.

"The relocator has the same rights as the original locator, although in strictness not a discoverer at all."

Armstrong v. Lower, 15 M. R. 631;
Zerres v. Vanina, 134 Fed. 615.

FORFEITURE OF A MINING CLAIM DOES NOT CAUSE THE LAND TO REVERT TO THE PUBLIC DOMAIN: IT PASSES INSTANTER TO THE RELOCATOR AND THUS MAINTAINS PRIVITY BETWEEN THE RELOCATORS AND THE PARAMOUNT TITLE, NAMELY, THE LEGAL TITLE HELD IN TRUST BY THE UNITED STATES, UP TO THE MOMENT OF FORFEITURE, FOR THE PRIOR LOCATOR!

Cyc. Vol. 27, pp. 599, text and foot note with cases associated under first note 62.

The paramount title was held in trust for the prior locators up to the moment of forfeiture and relocation when the re-

locators *succeeded* to the mining claims and to the rights of the original locators in so far as the rights of the relocators *arose under* the original discovery of mineral on which the prior and subsequent estates of freehold and inheritance *were solely built*—

The base of the title of the prior locator and the relocator is the original discovery by the prior locators and if there was a discovery of mineral, as the bill of complaint alleges and the demurrer admit, the relocators have a perfect estate of freehold and inheritance! *There was no interregnum or lapse of time between the forfeiture and the relocation!*—the forfeiture and the relocation being a simultaneous act, each within the other.

The instant the entry was made and the notices posted on the lands in controversy, the trusteeship of the United States shifted or passed to the interest and for the benefit of the relocators, with the forfeiture *running* to the relocators and *not* to the United States: and there was no *mesne full* and completed legal and equitable title in the United States, even for an infinitesimal fraction of a second or at any time after the first location and the relocation, *nor is there now!*—simply the paramount title in the United States with the possessory title in this complainant and co-relocators.

The relocation at bar is predicated on a forfeiture arising through the non-performance of the annual labor, and *not* on an *abandonment* of the mining claims by the prior locators—By abandonment the prior mining claim would revert to the public domain, instanter, and the United States would have the complete legal and equitable title in the lands which under a forfeiture the possessory title would pass, instanter to the relocator as was pointed out by this court in *Lavagnino v. Uhlig*, 198 U. S. 443, as in that case this court held a relocator was not entitled to advance an application for patent under a junior overlapping claim and the ground of the decision was *that on forfeiture* of the original location the land *did not become a part of the public domain but passed to the locator!* That case settles the question of priority on our part with the paramount title.

Of course we do not contend that there is any privity between the estate of the prior locators and the subsequent relocators as the prior estate was extinguished by the forfeiture and relocation—We could not maintain any rights that the prior locators had nor do we succeed to their choses in action but their prior discovery coupled with our own discovery is the base of our title and their possessory title passed to us and we have the right to adopt a part or all of the boundary stakes using the de-

scription of the prior locators set out in their location notices *(Miller v. Taylor*, 6 Colo. 41; *Brockbank v. Albion Min. Co.*, 29 Utah 367; *Conway v. Hart*, 129 Cal. 484) and this surely shows a succession, independent of all other arguments, of legal rights, the only thing being extinguished by forfeiture and relocation being the right of the defaulting locator to remain in possession of the land or to assert any claims in connection therewith.

If the United States held the legal title in trust for the prior mining locations it could in no way *divest* itself of the paramount title and with forfeiture of the possessory or beneficial title at the time of relocation, necessarily, the paramount title continued in the United States and privity with the paramount title was established by the forfeiture and relocation.

In *Zerres v. Vanina*, 134 Fed. 615, it was held in conformity with all the decisions that "the original locator of mining ground is the discoverer and relactor is not a discoverer at all but a mere appropriator thereof and cannot hold the ground without making proof of forfeiture."

The relocation necessarily admits the validity of the prior location—Indeed, as said in *Snyder on Mines*, the existence as a fact of the former location (and discovery)

is the basis on which it rests and while this succession does not establish privity with the prior estate it is in conformity with our proposition that there was an instant shifting of the beneficial estate at the moment of forfeiture and relocation which placed us instantly in privity with the paramount title—That being so it necessarily must be admitted that we may litigate in the courts of the United States concerning our possessory and beneficial title independent of the paramount title by reason of the federal statute which provides.

> "No possessory action between persons in any court of the United States for the recovery of any mining title or for damages to any such title, shall be affected by the fact that the paramount title to the land in which such mines lie is in the United States; but each case shall be adjudged by the Law of Possession."
>
> *U. S. Comp. Stat.* (1901) Sec. 910.

The only argument made by counsel in the court below concerning this subject were predicated on their following contentions:

1. That the mining claims of the prior locators were not pending in the general land office on application for patent at the time of the filing of the map of definite location and therefore and notwithstanding the perfected mining location, the lands in controversy

passed by the grant! We have fully answered that contention heretofore.

2. That it is not alleged that any mineral in *paying quantities was discovered.*

Discovery of mineral in *paying quantities* is not required in order to make a valid mining location, *mineral* only sufficient to justify a reasonable man to make further investigation and expenditure of time, labor and money is necessary and we will rest this contention without further argument.

Iron S. M. Co. v. Mike & Starr Gold & Silver M. Co., 143 U. S. 394;
Burke v. McDonald, 2 Idaho 339 & 679;
Harrington v. Chambers, 3 Utah 94;
M. C. R. R. v. Migeon, 68 Fed. 811;
O'Donnell v. Glenn, 8 Mont. 248;
Book v. Justice Co., 58 Fed. 827.

3. That is not alleged in the bill of complaint that (a) the annual assessment work for any of the years succeeding such location was ever performed or (b) that such locators ever remained in possession of said claims or (c) that the prior locators performed any development work thereon or (d) extracted any mineral therefrom and (e) that the kind of mineral discovered is not described.

In answer we say (a) that the performance of annual assessment labor is only necessary to prevent forfeiture and as between the government and the locator the performance of the annual labor is unnecessary (leading case, *Beals v. Cone*, 27 Colo. 473) *and valid entry can only be cancelled by a new entry:* (b) possession is presumed from the mining title as we pointed out elsewhere in this brief (c), the performance of "development work" is only required in instances where there is a local rule or statute requiring the performance of "development work" and no such statute or local rule ever existed or now exists in California; (d) it is not necessary to "extract mineral" from a mining claim if the locator prefers to keep his mineral in the ground and not "extract" the same it is his business and his business only and (e) as we say "mineral" includes all or any kind of mineral and there being no "special" demurrer in the case the question of sufficiency of any alleged minor fact may not arise here.

Finally the defendants claimed (a) that such prior locators were not in privity with the title of the United States and could not have maintained any suit themselves to protect their possessory and beneficial title and on examination of such argument this court will find that it is entirely predicated on their contention that until a mining locator has secured a patent

from the United States he cannot maintain an action to quiet his title against trespassers, interlopers or predatory railroad claimants seeking title to mineral lands under the guise of an "agricultural patent"and such extraordinary argument was advanced and insisted on by counsel in face of the statute that permits claimants to the public lands under possessory title to litigate such questions *independent* of the paramount title of the United States and cases were confidently cited that were *decided prior* to the passage of the statute and two unreported decisions by district judge Wellborn that an action to *cancel and annul* a patent of the United States could not be maintained by a person claiming under a mining location until such time as the mining location had ripened into a patent!

In these cases Judge Wellborn cited and approved the proposition that the mineral exception was valid but said that the *action to cancel* the intermediate railroad patent could only be maintained by a subsequent patentee! We have continuously contended that we are not trying to cancel a patent but in the language of *Van Ness v. Rooney* in speaking of such a patent we are seeking an interpretation of the patent in an effort to ascertain if the legal title to the lands in controversy passed under the patent.

Scores of cases of litigants claiming under possessory and beneficial

titles are daily heard and decided by courts in the mining states and it will be a new and extraordinary doctrine to be announced to those courts that a mining locator may not quiet his title to his location until such time as he has secured a patent to his land and it will be a further extraordinary proposition to announce to those courts that a title to a mining claim is not safe from intrusion until a mining patent is secured—If it were true as contended by counsel *that the legal title was vested in the defendant* railroad company at the time of the relocation then we would admit that our relocations were futile and this action could not be maintained.

In such connection they also cited the case of *James v. Jameson,* 155 Cal. 275, which simply holds that a mining location may not be made on land held under a homestead location and that after the matter has been fought out in the land department in a contest of which the mining locator had due notice the subject will not be reopened in the courts as to the questions of fact passed on and decided by the land department and that consequently a patent issued under such circumstances may not be collaterally impeached and cancelled.

Furthermore counsel contended that a mineral locator had nothing but "the right of present and exclusive possession" for the purpose of mining but that the land lo-

cated and held under the valid, subsisting mining locations does not cease to be a part of the public domain *until patent issued* and that prior to that time the legal and equitable title remained in the United States, but even at that the *"possessory title"* was not in the United States and all outstanding titles remaining in the United States were held solely by the government in trust for the locator, and under the statute above referred to all litigations concerning the possessory title could be litigated in the courts of the United States independent of the paramount title, thereby *sweeping* aside the former rule that the question of title could only be litigated or questioned by the paramount title or that a suit to quiet title could not be maintained by the equitable title against the legal title.

"But" continued counsel "even if it be conceded that a mining location which has *not* been entered in the United States land office *vests* in the locator the *complete* equitable title, with the legal title remaining in the United States, such rule is not controlling because the assertion of the mining claim does not deprive the land department of its jurisdiction to investigate *and after notice to determine whether the claim be valid or not—"*

True, but the answer is that the *Land Department has not and will not enter* on such investigation and for the simple

reason such investigation would only determine the mining claims to be valid (and of great value) and that fact will be *presumed* until the entry is cancelled after *notice and hearing;* and the land department claims it has not jurisdiction but at the same time the department of the interior through its geological decision has, subsequently, examined the land and designates it as *mineral* as our bill alleged.

Such was the only argument of the defendant railroad company on this question. Therefore we contend that we are clearly in privity with the paramount title and have, at least, been in privity with the paramount title *ever since the moment of forfeiture and relocation,* and, we submit, that is sufficient to enable us to maintain our action under the added jurisdiction conferred on the federal court by section 738 of the California Code of Civil Procedure.

We do not consider it essential that we should have been in privity with the paramount title at the time the patent issued and in support of such contention we offer the following reasons and authorities.

If at the time the patent issued the legal title passed thereunder we admit that only persons holding an antecedent equitable title could impress a trust on the patent owing to fraud, imposition and mistake in instances of a *voidable patent issued, within* the

jurisdiction of the land department, for land wholly owned by the United States, but in all the cases cited by counsel under such contention *the legal* title of the United States *had passed* under a patent: the cases cited by the defendants in such connection were: *Kemp case*, 104 U. S. 639; *Steel case*, 106 U. S. 447; *Hartman v. Warren*, 76 Fed. 157; *Deweese v. Reinhard*, 61 Fed. 777; *Carter v. Thompson*, 65 Fed. 329; *Jameson v. James*, 155 Cal. 275; *Peabody etc. v. Gold etc.*, 111 Fed. 817; *Bear v. Luce Fed. cases* No. 1179; *New Dunderberg v. Old*, 79 Fed. 598; *Nielson v. Champagne etc.* 119 Fed. 123; *Oregon etc. v. Deschutes etc.*, 172 Fed. 738; *Lee v. Johnson*, 116 U. S. 48-53; *Sparks v. Pierce*, 115 U. S. 408; *Meader v. Norton*, 11 Wall. 442-458; *Johnson v. Towsley*, 13 Wall. 72; *Silver v. Ladd*, 7 Wall. 219-228; *Warren v. Van Brunt*, 19 Wall. 646; *Moore v. Robbins*, 6 Otto 530, 539; *Shepley v. Cowan*, 1 Otto 330-340; *Marquez v. Frisbie*, 101 U. S. 473-479; *Bohall v. Dilla*, 114 U. S. 47-51; *Maxwell Land Grant case*, 121 U. S. 380-381; *Knight v. U. S. Land etc.*, 142 U. S. 161-216; *Monroe etc. v. Becker*, 147 U. S. 47-59; *In re Emblen*, 161 U. S. 52-57; *Duluth etc. v. Roy*, 173 U. S. 587; *Emblen v. Lincoln etc.*, 184 U. S. 660-664; *Manning v. San Jacinto Tin Co.*, 9 Fed. 727-735; *Scott v. Lockey etc.*, 60 Fed. 34-37; *Campbell v. Weyerhaeuser*, 161 Fed. 332-334.

None of the cases are at all in point except as a converse proposition and in that way each of them is strictly in our favor.

None of these cases hold it necessary for a complainant to be in privity at or prior to the time the attacked patent issued except in those instances where it is sought to impeach the patent by charging it with a trust—In that case the United States could in a direct suit cancel the patent or the antecedent title could impeach the patent and impress on it a trust but we seek to do neither—we simply ask an interpretation of the patent in an action to quiet title under the allegation that the patent was *void* and did not pass the legal title; *or that under the mineral exception the legal title did not pass,* not as in the above cases that the patent was merely voidable and did not, as those cases, operate to pass the legal title.

The Right to Attack.

Constant s u g g estion was made by counsel in the courts below that conceding this complainant was right in all his contentions, he could not maintain this suit as the remedy was entirely in the hands of the government and, in any event, required a direct suit which, they contended, could only be maintained by the United States and that, as a matter of

law, this complainant was a stranger to all the transactions he was complaining of.

We contend we are entitled to maintain this suit under the circumstances and for the following reasons:

1. By force of the mineral exceptions inserted in the patent according to law and pursuant to the express agreement of the United States and the defendant railroad company.

We assume this proposition to be self-proving: if the mineral exception was lawfully inserted in the patent the legal title to the lands in controversy remained in the United States and, being mineral lands, were part of the public domain and subject to location under the mining laws of the United States.

2. By reason of the known mineral character of the controverted lands and independent of the mineral exception, the legal title did not pass under the patent which was void and not voidable.

This proposition is based on the cases of *Van Ness v. Rooney*, 160 Cal. 131; *Looney v. Scott*, 112 Pac. 173; *Kansas City M. & M. Co. v. Clay*, 3 Ariz. 326; *Old Dominion M. & M. Co. v. Haverly* (Ariz.), 90 Pac. 336; *Garrard v. Silver Peaks*, 82 Fed. 578, S. C. 94, Fed. 989; *Stoddard v. Chambers*, 2 How. 284; *Hosky v. Moran*, 178 U. S. at pp.

211-212; *Deffeback v. Hawke,* 115 U. S. 392; *Gold Hill Mining Co. v. Ish,* 5 Ore. 104; *Davis v. Weibbold,* 139 U. S. 507; *Morton v. Greene,* 88 U. S. 660; *which were all instances of collateral attack,* and while the attack sometimes failed, owing to the facts the doctrine was in each instance squarely laid down that a United States patent for land known to be mineral at the time of purchase *was void* and not voidable, and it is elementary that the legal title of the United States does not pass under a void patent and that a void patent may be attacked and avoided in any action where it is the basis of the prosecution or defense.

Williams v. S. P. Co., 153 Cal. 44.

3. By reason of the known, prior, valid, subsisting, recorded mining locations, the lands in controversy were segregated from the public domain and not subject to patent; and that thereby the patent to the defendant railroad company was *void* and not voidable and was not issued within the jurisdiction of the land department.

a. The recordation of the mining location was legal notice to all the world.

U. S. v. C. P. R. R. Co., 84 Fed. 221.

On the general proposition, see:

Burfenning Case, 163 U. S. 321;
Noyes v. Mantle, 127 U. S. 349-351;
Haws v. Victoria etc., 160 U. S. 303;
St. Louis M. & M. Co. v. Montana, 171 U. S. 650-55.

4. If the patent being void it was validated as against the United States by the federal statute of limitations under the theory of the Chandler-Dunbar Case, it was validated as whole, including the mineral exception, as such patent as validated would convey just what was contemplated by the granting act of July 27, 1866, namely, *non*-mineral lands, and thereunder the legal title of the lands in controversy would remain, subject to mining locations, in the United States.

5. We submit, that in any event, the patent is subject to direct and collateral attack by reason of the fact that the patent is not conclusive under the rule of the *Barden* case relating to lack of jurisdictional recitals and further lack of a statement or declaration of the agricultural non-mineral character of the lands described in it.

It was urgently contended by counsel in the courts below that only the United States or one in priority with the

paramount title *at the time* of the issuance of the patent could be heard to complain, but we based our attack on the patent, in this instance, on the solemn language of this court in the *Barden* case that until the land department, after examination and decision, issued a patent *containing* such a statement the land department would not have complied with the law, with the act of congress in relation to a patent issuing under a railroad land grant, and it is elementary that a patent that does not, in its issuance, comply with the law *is void*, not voidable, which result only arises in cases of fraud, imposition, inadvertence or mistake. A patent issued in violation of the terms of the law *is always void*.

6. That it appearing from the face of the patent and from the antecedent record in the land office that there was no prior decision of the question of fact of the mineral quality of the land, the patent is not the result of a judgment or decision of a question of fact relating to the quality of the land and is not conclusive of such question, and the mineral exception repelling any inference that the land department decided antecedently or otherwise that no legal subdivision of the controverted land was not mineral in character, as per opinion of Judge Bean, *supra;* that thereby the legal title to such of the lands embraced in the patent as are min-

eral in character did not pass from the United States.

a. We raise the question of the mineral exception under this point on the additional ground, that independent of all questions, it is a declaration of the land department that it issued the patent in violation of law and of its duty in failing "to primarily determine" the quality of the land and that, therefore, the patent is void, not *voidable.*

7. Our main reason for our contention will be fully argued under the main question, the seventh, certified to this court.

Before passing to the seventh and controlling question certified to this court we will take up the question of the mineral character of petroleum, which is the fifth question certified to this court.

It reads as follows:

"IS PETROLEUM OR MINERAL OIL WITHIN THE MEANING OF THE TERM MINERAL AS IT IS USED IN SAID ACTS OF CONGRESS RESERVING MINERAL LAND FROM THE RAILROAD LAND GRANTS?"

It will be observed, in the first instance, that the Circuit Court of Appeals speaks of petroleum as *"mineral oil."*

Long before the grant to the defendant railroad land grant was made

the congress reserved "In all cases lands valuable for *minerals*" and provided "*All valuable mineral* deposits * * * are hereby declared to be free and open to exploration," and later the congress provided:

> "No act passed at the first session of the 38th congress, granting lands to states or corporations to aid in the construction of roads * * * shall be so construed as to embrace mineral lands, which in all cases are reserved exclusively to the United States unless otherwise *specially* provided in the act or acts making the grant."

The Act of July 27, 1866, made a grant to the defendant railroad company of lands

> "'not mineral'; * * * provided further that *all* mineral lands be and the same are hereby excluded from the operation of this act * * * shall not be held to include iron or coal."

The congress also defined "placers" as including *all forms* of deposit, and the Act of February 11, 1897, provided that

> "* * * may enter and obtain patent to lands containing *petroleum or other mineral oils* and chiefly valuable therefor under the provisions of the law relating to placer mineral claims."

This court will observe that the act recognized petroleum as a min-

eral and did not by statutory authority direct it to be classed as a mineral. This is apparent as it speaks of "petroleum *or other mineral oils*" and consequently it must be taken that the act was only declaratory of the law and of the fact. The right to locate under the placer act is specifically limited to "petroleum or other *mineral* oils," not to petroleum and other oils.

Congress, independent of the fact or scientific authority, may say what shall be considered as a mineral, just as it had the right to say in the granting act that "iron and coal" shall not be held as "*mineral*" within the contemplation of the act.

This view is amplified by the Act of January 31, 1901, which permitted lands containing *salt springs* or deposits of salt in any form to be taken up under the placer laws. The act did not make *salt* a mineral, but removed the prohibition that had existed up to that time that prevented the acquisition of saline lands.

Coal has never been *defined* or designated by the congress as a mineral any more than petroleum, but the courts have ever considered that "all mineral lands" to be these which as a matter of fact contained any form of mineral that made the land more valuable for mining than for agriculture.

The argued contention of the defendants in the courts below was

that "Petroleum or oil is not within the meaning of the term 'mineral' as it was used in the act of congress reserving mineral land from railroad land grants and oil bearing lands are not reserved from such grants."

No authority was cited in support of the proposition and the defendants said only:

"The effort of the complainant in this case to secure the title to the land described in the amended bill of complaint is prompted by the belief that such lands are valuable because of petroleum or oil supposed to be contained therein. Whenever the question is presented in any case *so that it may become material,* we shall present to the court our views to support us in the contention that petroleum or oil is not a mineral within the meaning of the term as it was used in the act of congress herein in question. No valid reason can be suggested why, if congress intended the railroad company to have the benefit of any coal or iron lands within the limits of the grant, it should not also have the benefit of any oil or petroleum within such grant, as oil or petroleum is as essential to the business of a railroad as coal or iron; and was not a 'mineral' within the meaning of the term as it is used in the granting act?"

It will be observed that the defendants do not allege that petroleum is not a mineral in fact, but alleges that no good reason exists why congress should not have granted the oil lands to the railroad company in view of the fact that the railroad company

"needs" the petroleum or mineral oil in its business.

The plainest and most natural answer to the observation is, as it must be apparent to this court, that if the congress wished or desired that the railroad should have received under the grant "petroleum or other mineral oil" land the congress would have said so and cut out of the exception of "all mineral lands," in addition to coal and iron lands, "all lands bearing petroleum or other mineral oil lands."

Congress, when it made its first grant to the Northern Pacific Railroad Company, did not exclude mineral lands from the grant, and the outcry throughout the country, as evidenced by the subsequent debates in congress, was so great that the congress again took up the subject and resolved to cut out all mineral lands, but on reflection and after debate and consideration modified the exception of "all minerals" so that the exception should not be construed to include coal and iron lands. Many other things besides coal and iron are needed in the business of a railroad, such as copper for the telegraph lines, which land grant railroads were required to construct under the granting acts; granite and other building stone for its bridge and roadbed foundations, cement for its superstructures, mineral paints for painting its equip-

ment, but none of such minerals were cut out of the mineral exception.

The construction of the grant in every instance and under all circumstances *must be resolved against the defendant railroad grantee* and the intent of congress must be derived from the plain text of the grant, and this court will not delve into the mind of congress in search for a supposition that congress intended something different than its will as explicitly expressed in its grant. Whether congress would have cut petroleum or other mineral oils out of the mineral exception of the grant if its attention had been specifically called to its mind that the railroad company needed petroleum or other mineral oils in its business, is not for this court to say, as such a course would be wholly transferring the legislative functions of congress to this court, and would permit this court to give to the railroad company, by way of legislative action, mineral lands worth half a billion of dollars and which congress in 1866 refused to give to the defendant railroad and which proposition today would involve in complete political ruin and destruction any public man that even dared to advocate such a proposition.

The proposition of the defendants in such connection has absolutely no

foundation in reason, and in our opinion is simply another anchor to the windward.

We fully recognize the right to every litigant to fence for safety, to manoeuvre for position and advantage, but we submit the defendant went very far, in the courts below, when they contended that the will of congress could be evaded by an arbitrary decision that "coal and iron means coal, iron and petroleum or other mineral oils."

It will be necessary for this court so to do in order to uphold the contention that "petroleum or other mineral oils" are not minerals in contemplation of the act of congress because the defendant railroad company "needs petroleum or other mineral oils in its business"; that is the only argument advanced by the defendants on this subject.

That congress intended just what it said is plainly expressed by this court in *Soderberg v. N. P. R. R. Co.*, 188 U. S. 526, where it was held that granite was a mineral and that granite bearing lands were excluded from the railroad land grant under the exception of "all minerals" and that such lands could be taken up under the placer mining laws.

The argument in that case was presented on the part of the United States by Mr. Justice Van De Venter, then an

assistant United States attorney general. Amongst other things he contended:

> "The term 'mineral lands' and terms of like import, whenever used in the acts of congress making railroads or other land grants, or in the mining laws, either as words of reservation or as authorizing the disposal of the lands thus described, have the same meaning and same breath of signification. (*Davis v. Weibbold*, 139 U. S. 507; 1*Lindley Mines*, Secs. 86, 152, pp. 92, 170.)"

Coal lands are "mineral lands" within the meaning of the term as used in statutes regulating the disposition of the public domain. (*M'ullan v. U. S.*, 118 U. S. 271.)

Lands valuable for mineral, whether of the metallic or non-metallic class, are subject to location, entry and purchase under the provisions of the mining laws and are also within the exception of "mineral lands" from railroad land grants. (*Hooper's Case*, 1 L. D. 560; *Maxwell v. Briely*, 10 Copp's Landouver 50; *Lindley Mines*, Secs. 96, 98, 137, 158, 162; *McGlenn v. Wienbroeer*, 15 L. D. 370; *Van Doren v. Plested*, 16 L. D. 508; *Hayden v. Jameson*, 16 L. D. 508; *Shepherd v. Bird*, 17 L. D. 82; *Gary v. Todd*, 18 L. D. 58; *Gibson's Case*, 21 L. D. 327; *Union Oil Co. Case*, 25 L. D. 354; *Pacific Marble Co. v. N. P. R. R. Co.*, 25 L. D.

233; *Alldritt v. N. P. R. R. Co.*, 25 Land Dec. 349; *In re Florida etc.*, 26 L. D. 600; *Richter v. Utah*, 27 L. D. 95; *McQuiddy v. California*, 29 L. D. 181; *Tulare Oil Co. v. S. P. R. R. Co.*, 29 L. D. 269; *Beaudette v. N. P. R. R. Co.*, 29 L. D. 248; *Schrimpf v. N. P. R. R. Co.*, 29 L. D. 327; *Morrill v. N. P. R. R. Co.*, 30 L. D. 475.)

Nothing passes by implication under grants of a public nature *but in the clear and explicit* language of the grant *must* be found all that is *conveyed* by it. When doubt arises the grant *must* be construed most strictly against the grantee. (*D. & P. R. R. Co. v. Litchfield*, 23 How. 66; *Slidell v. Grandjean*, 111 U. S. 412; *Barden v. N. P. R. R. Co.*, 154 U. S. 288.)

The value of a mineral deposit rather than its kind, appears to have been the controlling factor in determining whether the lands containing it were subject to entry and patent under the mining law. (*Pacific Coast etc. v. N. P. R. R. Co.*, 25 L. D. 233.)

Petroleum is a mineral. (*Gill v. Weston*, 110 Pa. St. 312; *Westmoreland Natural Gas Co. v. DeWitt*, 130 Pa. St. 235; *Hague v. Wheeler*, 157 Pa. St. 324.) Natural gas is a mineral. (*Re Natural Gas Co.*, 73 Fed. 191.)

A mineral has been defined to be a fossil, or what is dug out of the earth. The term may, however, in the most enlarged sense, be described as comprising all the substances which now form, or which once formed, part of the solid body of the earth, both external and internal, and which are non-destitute of and incapable of supporting animal or vegetable life.

In this view it will embrace as well the bare granite of the high mountain as well as the deepest hidden diamonds and metallic ores. (*Bainbridge, Mines,* pp. 1, 2.)

"Mineral" in its general legal sense is any valuable inert or lifeless substance formed or deposited in its present position through natural agencies alone, and which is found either in or upon the soil of the earth or in the rocks beneath the soil. (*Barringer and Adams, Mines,* p. LXXVI.)

The mining laws from their earliest history have been administered by the land department as applicable in all their force and effect to the public mineral lands within the limits of railroad land grants. (*C. P. R. R. v. Valentine,* 11 L. D. 238.)

The term "minerals" standing alone and as understood in mining law, generally comprehends and includes all the substances in the earth's crust which are sought for

and removed by man for the substance itself. (1 *Snyder Min.*, Secs. 134, 140, 143, 145; 2 *Id.*, Sec. 926.)

Before passing to the *Soderberg case*, which upheld all the contentions made there, Asst. Atty. General Van De Venter will cite a few additional authorities concerning petroleum treated solely as a mineral.

In *Thornton on Oil and Gas*, section 18, the author says:

> "Whatever may have been thought of oil or natural gas at one time (*Dunham v. Kirkpatrick*, 101 Pa. St. 43), it is *now established beyond any question that * * * petroleum * * * is a mineral and judicially must be so treated.* (*Murray v. Allred*, 101 Tenn. 100, and numerous other cases cited in footnote.)"

At section 304 he said:

> "A clause in a deed of conveyance reserving 'all minerals' has been held not to include petroleum. (*Dunham v. Kirkpatrick*, 101 Pa. St. 36.)"

But this decision has been greatly shaken in the state where it was rendered by a subsequent decision (of the same court) holding that petroleum is a mineral substance obtained from the earth by a process of mining, and lands from which it is obtained may be designated as mineral lands. (*Gill v. Weston*, 110 Pa. St. 312.)

In *Murray v. Allred,* 100 Tenn. 100, in case of a reservation in a deed of conveyance of "all mines, minerals and metals in and under the land," it was held that petroleum was a mineral and included in the reservation.

In an early Pennsylvania case it was said: "Oil is a mineral, and being a mineral is part of the reality." (*Funk v. Haldeman,* 53 Pa. St. 229.) Practically the same language was used in *Williamson v. Jones,* 39 W. Va. 231, defining petroleum as a mineral, and in *Union Oil Co. Case,* 25 L. D. 351, arising under the Southern Pacific Railroad land grant, it was decided that petroleum was included in the mineral exception that is under consideration here.

It is true that the earlier Pennsylvania case holding that petroleum is not a mineral is partially supported by an Ohio decision (*Detlor v. Holland,* 57 Ohio St. 492), but it was said in the latter case: "There is nothing to show it was the intention of the parties that oil should be included in the conveyance."

It will be noted, however, that in the construction of a railroad land grant *all doubts are to be resolved by this court against the railroad grantee,* and if consequently this court should conclude to pass on the "inten-

tion" of congress as to whether or not the congress "intended" to contemplate petroleum as a mineral that should be included in the mineral exception, the rule of construction requires this court to find that it was the intention of congress to exclude "petroleum or other mineral oil" from passing under the grant.

In the *Soderberg case* this court at page 529 (188 U. S.) said:

> "We are thus brought to the main question in the case, viz., whether lands valuable solely or chiefly for granite quarries are mineral lands within the exception of the grant of 1864."

The 3d section of the Act containing the granting clause of land "not mineral" also contains the following provisions: "Provided, further, that all mineral lands be and the same are hereby excluded from the operations of this Act * * * and provided, further, that the word 'mineral' when it occurs in this Act shall not be held to include coal and iron." The *inference* from this proviso is that in the absence of a special provision both iron and coal would be considered mineral, and this, to repel the idea that only metals were included in the word "mineral," must be construed as synonymous with metallitens.

Upon the other hand sec. 2 declared that "the right, power and au-

thority is hereby given to said corporation to take from the public lands adjacent to the land of said road material of earth, stone, timber, etc., for the construction thereof."

There is a possible inference from this that stone was not to be regarded as a mineral although it is more likely that a grant was intended of all material serviceable in the construction of the road even though it might otherwise be excepted from the grant as a mineral. Taking these two sections together, it would seem that the reason for providing in the 3d section that iron and coal lands should not be deemed mineral was the same as the liberty given by the 2d section to take materials of earth, stone and timber; namely to facilitate the construction and operation of the railroad, in which large quantities of coal and iron would be required.

The word "mineral" is used in so many senses, *dependent on the context,* that the ordinary definitions of the dictionary, throw but little light upon its signification, in a given case.

Thus the scientific division of all matter into the animal, vegetable or mineral kingdom would be absurd as applied to a grant of lands, since all lands belong to the mineral kingdom and therefore could not be excepted from the grant without being destruction to it—Upon the other hand, a definition which would

confine it to the precious metals—gold and silver —would so limit his application as to destroy at once half the value of the exception—Equally subsersive of the grant would be the definition of minerals found in the Century Dictionary: as "any constituent of the earth's crust" and that of Banelnedge on Mines: "all substances which now form or once formed, a part of the solid body of the earth."

Nor do we approximate much more closely to the meaning of the word by treating mineral as substances which are "mined" as distinguished from those which are "quarried." Since many valuable deposits of gold, copper iron and coal lie upon or near the surface of the earth, and some of the most valuable building stone, such, for instance, as the casen stone in France is excarted from mines running far beneath the surface—This distinction between underground mines and open workings was expressly repudiated in Midland etc. v. Haunchwood etc. L. R. 20 Ch. Div. 552, and in Hext v. Gill L. R. 7 Ch. App. 699.

The ordinance of May 20, 1875, authorizing the sale of lands in the Western Reservation of "one third part of all gold, silver, lead and copper mines to be sold or otherwise disposed of, as congress shall hereafter direct," was evidently intended as an assertion of the right of the government to a royalty upon

the more valuable metals. * * * A division of lands into agricultural and mineral would also be a most uncertain guide to a proper construction of the word "mineral" since most of the lands included in the limits of the grant are neither one or the other but desert or rocky land of no present value for agriculture and of little value for their mineral deposits—So, too, the general reservation in the easier acts of congress of lead mines, and saline springs seems to have been dictated by the fact that those were the only valuable minerals known to exist in the states to which the acts were applied while in Michigan and Wisconsin there was a similar reservation of copper, lead and other valuable ones which were just then being discovered and made available.

In the earlier grants of congress to railroads there was generally no reservation of mineral lands, but in the grants subsequent to 1860, to the Lake Superior and Pacific roads, *through unsurveyed and almost unknown territories*, a reservation was invariably made of lands suspected of being rich in metals.

It is quite true, had it not been for the actual or suspected presence of such metals, congress might not have decided it worth while to reserve the non-metallic mineral lands: *but when* its attention was called to the fact that valuable mines might exist along lines of these roads, as it appears to have been in about

1860, *its policy was changed* and not only metalliferous, but all *mineral lands* were reserved. * * * Considerable light is thrown upon the congressional definition of the word "mineral" by the acts subsequent to the Northern Pacific Grant of 1864 and prior to the definite location of the line in 1884 * * the first of these acts that of July 26, 1866, (the day before the Southern Pacific Railroad Grant) declares that the "mineral lands" of the public domain shall be free and open to exploration and occupation, subject to such rules as may be prescribed by law, and subject also to the *local* customs or rules of miners in the several mining districts—The 2d section provides that whenever any person or association of persons claim a vein or lode of quartz or other rock in place, bearing gold, cinnabar or copper, he shall be entitled to enter such tract and receive a patent therefor, upon *complying with certain preliminaries* and with a right to follow such views into adjoining lands—

The argument made in this connection by the railway company would confine the terms "mineral lands" to lands bearing gold, silver, cinnabar or copper which would exclude all other metalliferous lands, such as contain iron, lead, tin, nickel, platinum, aluminum, etc.,—a limitation wholly inconsistent with the use of the word "mineral" in the 1st section. * * *

Indeed, by the very terms of the granting act of July 2, 1864, not only were all mineral lands excluded, but the grant is limited to those lands to which "the United States have full title, not reserved, sold, granted or otherwise appropriated and free from pre-emption and other claims or rights, *at the time the line of said road is definitely fixed* and a plat thereof filed in the office of the commissioner of the general land office"—It results from that that if, before the definite location of the road, congress had withdrawn certain of these lands from the grant, the company was bound by such withdrawal and compelled to accept other lands in lieu thereof within the *indemnity* limits of the grant.

In construing this grant, we must not overlook the general principle *announced in many cases in this court*, that grants from the sovereign *should receive a strict construction*—a construction which shall support the claim of the government rather than that of an individual. *Nothing passes by implication*, and unless the language of the grant *be clear and explicit as to property* conveyed, that construction will be adopted which favors the sovereign rather than the grantee.

The rulings of the land department to which we are to look for the contemporaneous construction of these statutes, have been subject to very little fluctuation and almost

uniformly, particularly of late years, have been strong to support the theory that the words "valuable mineral deposits" should be construed *as including all lands* chiefly valuable for other than agricultural purposes and particularly as including non-metallic substances, among which are held to be * * * PETROLEUM * * *. In *Funk v. Holdeman*, 53 *Pa. St.* 229 *and Gill v. Weston*, 110 *Pa. St.* 313, *petroleum was held to be a mineral*, although the act authorizing the lease of mineral lands was *passed before petroleum* was discovered—See also *Gird v. California Oil Co.*, 60 Fed. 531—The same principle was extended in *Westmoreland & Co. Natural Gas Co. v. DeWitt*, 130 Pa. St. to natural gas which was said to be a mineral *ferae naturae* * * *

We do not deem it necessary to attempt an exact definition of the words "mineral lands" as used in the act of July 2, 1864. With our present light upon the subject it might be difficult so to do—It is sufficient to say that we see nothing in that act or in the legislation of congress up to the time this road was definitely located (1884) which can be construed as putting a different definition upon these words from that generally accepted by the text on the subject—Indeed, we are of opinion that this legislation is consistent with, rather than opposes, the *overwhelming* weight of authority to the effect *that mineral lands include,*

not merely metalliferous lands *but all such as are chiefly valuable for their deposits of a mineral character* which are useful in the arts or valuable for the purposes of manufacture."

"Valuable for purposes of manufacture." It would be impossible within the confines of this brief to enumerate "the purposes of manufacture" for which petroleum is the base; amongst them, light, heat, power, electrical development and a thousand bi-products! used in the arts, sciences, medicine!

And why is petroleum "needed in the business of a railroad"? Only for the purposes of *economic waste,* a very crime against civilization! as stated not only by Rockefeller but by every authority on the subject in the world.

To burn petroleum in the furnaces of a locomotive should be made a felony and the time is fast approaching when as recommended by the United States officials petroleum will be made a public use and its production and uses regulated.

Now what is the contemporaneous construction of the land department and the courts as to defining petroleum as a mineral that exclude petroleum bearing lands from passing under the railroad land grants even prior to the adoption of the act (Feb. 11, 1897)

extending the placer mining act to petroleum bearing grounds.

The land department on Nov. 6, 1897, and subsequent to the petroleum location act fully passed in the question.

It appears that in January, 1894, the Union Oil Co. made a mineral entry on certain land and the S. P. R. R. Co. and the railroad company protesting the mineral claimant was "required to show a discovery of a valuable deposit of mineral * * *, that the lands containing *"petroleum"* were not mineral lands within the meaning of the term as used in the act of July 27, 1866.

In the opinion of the land department it was said:

> "In the decision complained of it was held in substance and effect:
>
> "That lands containing petroleum are not subject to location and entry under the mining law.
>
> "That such lands do not fall within the meaning of the exception of 'all mineral lands' from the grant of the railroad company: and * * * In view of the allowance by the local office of the mineral entry, and in absence of any showing to the contrary, it will be assumed the lands are chiefly valuable for the deposits of *petroleum* they contain and in that respect the entry was regular, if such lands are subject to mineral entry at law—
>
> "Upon this question the theory of the decision complained of ap-

pears to be that only lands containing metallic substances such as gold, silver, cinnabar, lead, tin, copper and deposits of like nature were within the contemplation of congress in the enactment of the mining statutes and in making the exception of 'all mineral lands' from the grant to the railroad company: that scientifically speaking, *petroleum* is a mineral yet it is not such a mineral as to render lands containing it, and chiefly valuable on account thereof, subject to entry under the mining laws, or to exclude them from the grant to the railroad company—It is insisted by the mineral claimant, both as a matter of original construction, *and under* the *uniform* practice of the land department for over *twenty years in permitting oil lands* to be entered and patented under the placer mining laws, that said decision is wrong and should be revoked.

"The provisions of the mining statutes, as at present codified from the Act of May 10, 1872, (17 Stat., 91-2), and other acts on the subject, are to be found in the Revised Statutes, sections 2318 to 2352, inclusive.

"Section 2318 provides that:

"'In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law.'

"Section 2319 provides that:

"'All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in

which they are found, to occupation and purchase * * * under regulations prescribed by law, and according to the local customs and not inconsistent with the laws of the United States.'

"Sections 2320 to 2328, inclusive, prescribe rules and regulations to govern the location of 'mining claims upon veins or lodes or quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits,' and provide the matter of obtaining title from the government for such mining claims.

"By section 2329 it is provided that:

" 'Claims usually called "placers," including all forms of deposit, excepting veins of quart, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings as are provided for vein or lode claims.'

"It is under this last section that the application for patent by the mineral claimant is preferred.

"The first department circular on the subject of the mining laws, was issued by Commissioner Drummond of the general land office, on July 15, 1873. (Copp's Mineral Lands, 61.) In defining what constitutes 'A valuable mineral deposit' within the meaning of those laws, the commissioner said:

" 'That whatever is recognized as a mineral by the standard authorities on the subject, where the same is found in quantity and quality to render the land sought to be patented more valuable on this account than for purposes of agricul-

ture, should be treated by this office as coming within the purview of the mining act of May 10, 1872.'

"It was further stated:

" 'The language of the statute is so comprehensive, and capable of such liberal construction, that I cannot avoid the conclusion that congress intended it as a general mining law, "to promote the development of the mining resources of the United States" and to afford a method whereby parties holding the possessory right under local laws and regulations could secure title to tracts containing valuable accretions or deposits of mineral substances, except when a special law might intervene, reserving from sale, or regulating the disposal of, particularly specified mineral-bearing lands.'

"In answer to certain inquiries which gave rise to the circular, it was said:

" 'I therefore reply that lands valuable on account of borax, carbonate of soda, nitrate of soda, sulphur, alum, and asphalt, as well as "all valuable mineral deposits," may be applied for and patented under the provisions of the mining Act of May 10, 1872.'

"Following this circular, on January 30, 1875, it was held by Commissioner Burdett, that lands containing valuable deposits of petroleum may be entered under the mining act of 1872 (Sickles' Mining Laws, 491); and on March 31, 1882, Commissioner McFarland, after stating that 'lands containing deposits of petroleum have been entered as placer and patented as such,' held 'that lands of that character are subject to entry and disposal according to the law and regulations relating to placer claims.'

"In the case of *W. H. Hooper* (1 L. D. 560-1881), the views expressed in the circular of July 15, 1873, were concurred in and approved by Secretary Kirkwood. And in the case of *Maxwell v. Brierly,* Secretary Teller, after referring to said circular with approval, held that lands containing deposits of gypsum and limestone. * * * asphaltum, borax, auriferous cement, fire-clay, kaolin, mica, marble, *petroleum,* slate, and other substances,' when more valuable on account of such deposits than for agricultural purposes, *are subject to the operation of the mining laws.*"

Such are some of the reported rulings and decisions of the land department, made shortly after the mineral land laws became a part of the public land system, and by the officers of the government, charged with their administration. As contemporaneous and uniform interpretation, they are entitled to great consideration.

From an examination of the records of your office, which I have caused to be made, it is ascertained that ever since the circular of July 15, 1873, until the date of the decision complained of, the practice of allowing entry and patent for lands chiefly valuable for their *deposits of petroleum,* under the law and regulations relating to placer claims, has been continuous and uniform. Under this practice a large number of patents have been issued, a very large and valuable property interests have been

acquired. Until the decision in this case, the correctness of the practice does not appear to have been questioned, and for that reason no case distinctly presenting such a question ever reached this department. The case of the *Piru Oil Company* (16 L. D. 117) was a contest between said company as applicant for patent under the mining laws, for several "oil mine" claims, and a homestead entryman of a part of the lands embraced in the mineral locations; but no question as to whether the lands were of the character subject to mineral entry, appears to have been discussed. The decision, which was in favor of the mineral claimant, was nevertheless an adjudication to the effect that oil lands are mineral lands subject to location and entry under the mining laws, if the requisite conditions as to value are shown to exist; otherwise the mineral locations could not have been sustained as against the homestead entry subsequently allowed. The principle, though not discussed, was necessarily involved, and the decision sustaining the mineral locations and entry is therefore not without weight. The case of *Roberts v. Jepson* (4 L. D. 60) was a similar contest. It was there held by Secretary Lamar that the mineral claimant had "failed to establish the character of the land *as oil land*, and, therefore, subject to location under the mineral laws."

Sufficient has been said to show that *ever since the circular of July* 15, 1873, until the date of the decision under review, the practice of the land department has uniformly been to allow entries under the mining laws of lands containing *valuable deposits of petroleum,* and that this view has obtained to such an extent that many titles to lands patented as mineral because of the valuable oil deposits contained therein, are now dependent upon it. Such having been the generally accepted view for so long a time, and extensive property rights having been acquired under the law as thus construed by the officers of the government whose duty it was to administer it, the demands of simple justice would seem to require that there should be no departure from that construction at this late day, unless called for by the clearest evidence of error, as well as the strongest reasons of public policy.

In the case of *United States v. Moore* (95 U. S. 760) the Supreme Court said:

> "The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons."

And in *Brown v. United States* (113 U. S. 568) it was held that:

> "In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who are called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to great respect."

These authorities are directly in point, and in view thereof, the construction in question, even though it were regarded of doubtful correctness, as an original proposition, should, in my judgment, be sustained.

It is proper in this connection to refer to the Act of February 11, 1897, *supra,* passed soon after the decision under review was rendered. By that act it was provided:

> "That any person authorized to enter lands under the mining laws of the United States, may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mining claims; *Provided,* That lands containing such petroleum or other mineral oils which have heretofore been filed upon, claimed, or improved as mineral, but not yet patented, may be held and patented under the provisions of this act the same as if such filing, claim or improvement were subsequent to the date of the passage thereof."

The language of the act clearly indicates, *and the debates of Congress,* as well as the report of the *Public Lands Committee of the House on the bill,* unmistakably show, that it was passed for the purpose of restoring the practice which had prevailed in the Land Department prior to the decision under review. In the House Committee's report reference was made to that decision in connection with some of the earlier rulings on the subject, as hereinbefore set out, and, *inter alia,* it was said:

> "Public lands containing *petroleum* and other mineral oils have been held and patented under the placer mining acts of the United States for many years past * * * The bill simply provides by legislation for procedure in the entry and patenting of those lands along the lines that have been pursued in the past under the decisions of the general land office; *so that there is no departure whatever from the procedure in the past for the development and acquirement of such properties.*"

This legislative action, so promptly taken atfer the departure from the earlier rulings and the long established practice thereunder, is significant, and can hardly be considered as less than a disapproval by congress of the changed ruling.

Several cases were cited in the argument from the Supreme Court of the

state of Pennsylvania, on the question as to whether petroleum is a mineral within the meaning of certain mineral reservations in contracts and deeds of conveyance between private parties. One case is quoted from quite extensively in the decision under review. *None of these cases*, however, involved the meaning of the word "mineral" or the term "mineral lands," as used in the public land laws, or in grants to railroad companies. They cannot be relied upon, therefore, as controlling precedents, or, in my judgment, as persuasive authority of much weight, in the decision of this case. In the case of Gird *et al.* v. California Oil Company, decided in 1894, by the United States Circuit Court for the southern district of California (60 Fed. Rep. 531), certain lands containing valuable deposits of oil were involved. Each party to the controversy asserted claim under the mining laws, and the suit was to determine the right of possession. In its opinion the court said:

> "The premises in controversy *are oil bearing lands*, the government title to which, under existing laws, can alone be acquired pursuant to the provisions of the mining laws relating to placer claims."

The right of possession was adjudged to the defendant; and it will be observed that the adjudication was *under the then existing* mining laws, relating to placer

claims. This was in entire harmony with the contemporaneous and long continued construction by the Land Department, as hereinbefore shown.

In the recent case of Pacific Coast Marble Company v. Northern Pacific Railroad Company and State of Washington (25 L. D. 233) the direct question as to what are "mineral lands" within the meaning of the mining laws and the exceptions contained in railroad and other land grants by congress, was involved. After an elaborate and exhaustive consideration of the subject, the department there decided to adhere to the rule:

> *"That whatever is recognized as a mineral by the standard authorities on the subject, whether of metallic or other substances, when the same is found in the public lands in quantity and quality sufficient to render the land more valuable on account thereof than for agricultural purposes, should be treated as coming within the purview of the mining laws."*

And it was further held:

> "That lands containing valuable mineral deposits, whether of the metalliferous or fossiliferous class, of such quantity and quality as to render them subject to entry under the mining laws—that is, when they are more valuable on account of such mineral deposits than for agricultural purposes—are "mineral lands" within the meaning of that term as used in the

exception from the grants to the railroad company and to the state."

Congress, by the Act of February 11, 1897, *supra, expressly recognized petroleum as a mineral oil,* and it was not disputed in the argument that the same is recognized as a mineral by the standard authorities on the subject, nor is it denied that the lands in question are chiefly valuable on account of the deposits of petroleum contained in them. They, therefore, come clearly within the principle and rulings of the case last cited, the discussion in which it is not necessary to repeat, and in view thereof, as well as of the long continued practice of the land department in permitting the entry *and patent of oil lands as mineral,* as hereinbefore set out, it must be held that they are lands of the character subject to entry under the mining laws; and for that reason the portion thereof situated in section 1, *could not be legally selected as indemnity by the railroad company even if its right to select the same were otherwise conceded.*

"These conclusions render it unnecessary to discuss the matter of the confirmatory operation of the Act of February 11, 1897, *supra.*"

The opinion in that noted land office decision was written by Mr. Justice Van De Venter at a time he was writing the opinions of the department of the interior under his detail as assistant attorney general, and the opinion was practically adopted by this court in the *Soderburg case.*

Petroleum is conceded to be a mineral by every scientific authority in the world; it is classed as a mineral by every mining state that has a metallurgical bureau; every standard textbook designates it as a mineral; all the products of petroleum, a thousand in number, are minerals.

Porter v. Mack etc., 65 W. Va. 636;
Sult v. Hochtetter, 63 *id.* 317;
Williamson v. Jones, 39 *id.* 231;
Westmoreland v. De Witt, 130 Pa. St. 235;
Moore v. Griffin, 72 Kan. 164;
Bee v. Barnes, 149 F. 727;
Barnes v. Bee, 138 F. 476.

The seventh question certified to this court reads:

If the mineral exception clause was inserted in the patent with consent of the defendant, Southern Pacific Railroad Company, and under an understanding and agreement between it and the officers of the interior department that said clause should be effective to keep in the United States title to such of the lands described in the patent as were, in fact, mineral, are the defendants Southern Pacific Railroad Company and the Kern Trading and Oil Company estopped to deny the validity of the clause?

It is the main question in the suit and while scant reference was made to it in the courts below it was constantly in view

and the Circuit Court of Appeals recognizing its importance certified it to this court.

We present it in its dual aspect (a) that the mineral exception was legally and validly inserted in the patent under the authority of the granting act and the patent being accepted by the defendant railroad company it had the effect of retaining the legal title to the lands in controversy in the United States, and (b) that the mineral exception having been inserted in the patent pursuant to the assent of the defendant railroad company and pursuant to the agreement between the United States and the defendant railroad company, the effect of the same and of the acceptance of the agreed patent, independent of any statutory authority to insert the same in the patent, is to retain the title to the controverted lands in the United States, and to estop the defendant railroad company from denying that the legal title to the lands in controversy remains in the United States thereunder. *Judge Ross did not pass on the question* and the judges of the Circuit Court of Appeals, as appears from their certificate, divided in opinion concerning the same.

In discussing this question it must be remembered by this court that, in any event, the mineral exception gave full and complete expression of the intent of the statute that neither known or unknown mineral

lands should in any event, directly or indirectly, pass to the defendant railroad company. That the mineral exception is consistent with public policy, good morals and the will of congress must be admitted, as it must further be admitted that in no event would any damage or loss result to the defendant railroad company by exception of all mineral lands as the law reserved to it a right of lieu selection of other lands of an agricultural nature, sufficient in amount and *character* to compensate the defendant railroad company for the areas lost to it in the primary grant through the discovery that certain lands therein were mineral in character.

On Feb. 1, 1912, as stated by the Dept. of the Interior there was 1,200,000 acres of lieu land still available to the defendant Railroad Co.

The mineral exception is consistent with morals, good faith, fair dealing and common honesty, while the position of the defendant railroad is that notwithstanding it could not in any event legally claim the admittedly mineral lands, of immense value, under the granting act and should not be permitted to claim any lands under its agreement, that, nevertheless through the mere issuance of the excepted and reserved and agreed reserved and excepted patent it must be presumed by this court that the lands in controversy are agricult-

ural in character and more valuable for agriculture than for mining purposes.

The position of the defendant railroad company is inconsistent with the granting act, inconsistent with the excepted patent, inconsistent with the antecedent record, inconsistent with the fact, inconsistent with its own solemn agreement, inconsistent with its acceptance of the excepted patent, inconsistent with its conduct in reserving from its grantees the claims of the United States to the lands as mineral lands, inconsistent with public policy, good morals, common honesty and the welfare of the nation, and can only be maintained by a fiction of law and fact. There is in this suit no innocent purchaser and no widow or orphan stands at the bar of this court asking that the public faith and credit be called on by this court to protect vested rights.

Neither may the defendant railroad company in this suit plead innocent investments of great or little or any amount as it has never been in possession of any portion of the lands in controversy which on the 2d day of March, 1909, were wild and mountainous and wholly without any agricultural value, unoccupied, without a token of physical domination and which it is apparent not a dollar has been expended by the defendants.

We are not here under this questior discussing the validity of the mineral exception, or whether or not it was legally inserted in the patent in controversy pursuant to express or implied statutory authority, but we are claiming that, on the record before this court, the insertion of the mineral exception inserted in the patent pursuant to the agreement and assent of the defendant railroad company and its acceptance of the patent after such agreement, estops it now from pleading that the mineral exception was not valid or from denying that thereby the title to the lands in controversy remains in the United States, and that the consideration for the insertion of the mineral exception in this instance was the issuance of a patent without antecedent examination or decision.

We have in another part of this brief pointed out what *Mr. Justice Field* in *LeRoy v. Jameson* said concerning the acceptance of a patent, showing that no one could be compelled to accept a patent.

It was clearly within the right of the defendant railroad company to refuse to accept the particular patent and *Mr. Justice Field* further pointed out in that case that the acceptance of a patent would not be presumed in the presence of expressed dissent! The only inference that may be drawn from the ac-

ceptance, without protest by the defendant railroad company, of the excepted patent *is* that it agreed to all its terms and conditions as expressly alleged in the *bills* of complaint herein.

Only recently (1911) the N. P. R. R. Co. returned an excepted patent to the land office with a protest against the inclusion in the patent of the mineral exception which the land department then as now, inserted in land grant patents! Why did not the defendant pursue such a course if it objected to the inclusion of the mineral exception in this particular patent?

If the defendant railroad company did not recognize the validity of the mineral exception why did it for years afterward insert in its deeds and agreements to convey lands this phrase, *"reserving all claim of the United States to the tracts above described as mineral lands"*? Why was that reservation carried in thousands of deeds and agreements to convey? There is only one answer and that is the defendant railroad company *knew* that the mineral exception inserted in the patent pursuant to its assent and pursuant to the agreement between it and the United States was in such respect a binding force and could not be disregarded.

We think it likely that as it is conceded that the exception in the patent

but gave expression to the intent of the grant and the exception in the grant, that the mere acceptance of such a patent estops and concludes the defendant railroad from denying the legal title remains in the United States *even* if *it were the fact* (as it is not) that the mineral exception was inserted in the patent without either the direction of the statute or consent and agreement of the defendant railroad company *as* the exception in the patent was but the expression of the statute. The case, in that particular, has only been passed on by this court by analogy. There is no direct statutory authority for various of the many exceptions contained in homestead, pre-emption and placer mining patents but they were inserted in such patents by the land department and upheld by the courts for the reason the exception is the expression and intent of the statute. For instance there is no direct statutory authority as pointed out by Judge Sawyer and others (*Paterson v. Ogden*, 141 Cal. 43) for the insertion in a homestead patent of an exception reserving to the proprietor of a penetrating ledge, in the land of another, to remove his on therefrom but such exception is universally upheld because it gives expression to the statute.

This court in *Reynolds v. Iron Silver Mining Co.*, 116 U. S. 687, pointed out that an exception of viens and lodes in a

placer mining patent had no direct statutory authority, and went on to say:

> *"Without deciding on the effect of the acceptance without protest* of a patent with such exceptions in the granting clause, when their insertion is a *voluntary* act of the officers who execute the instrument, it is sufficient to say, *that those conditions but give expression to the intent of the statute."*

The exceptions in the *Davis-Weibbold* and *Deffebach-Hawke* cases, as rightfully decided by this court, did not give expression to their predicating statutes but were in direct opposition to the law as the statute and the law gives to the holder of a placer mining patent the *entire surface* of the land embraced within the boundaries of the patent and the exceptions in these two cases attempted to retain practically *all the surface* of the land which the land department had decided should pass to placer mining patent and of course the attempted exceptions were void as they did *not give expression* to the statute and it may be said that while upwards of a million of patents have been issued containing exceptions giving expression to the statute under which they issued *not a single one* though the statute did not expressly authorize the insertion of an exception in the patent, *not a single exception* has been overthrown by any court at any place or time ex-

cept by *Judge Smoyer* in *Cowell v. Lammers* and *Francouer v. Newhouse* in which he held that the exception at the bar of this court was void because it did not give expression to the intent of the statute and limited the grant because, as he said, *unknown* mineral lands passed to the railroad company under the land grant act and that the patent could not take away what passed by the grant and the subsequent destruction of such doctrine by this court in the *Barden case,* renders his opinion on that point *functus officio.*

Thus we have seen that Mr. Justice Field in *LeRoy v. Jameson* said that *no one was bound to accept a patent and its acceptance* would not be presumed in face of expressed dissent: we have also seen what the California Supreme Court said in *Gale v. Best,* "and it might strongly be argued that in such case (of a patent containing the mineral exception), although it was the duty of the land department to determine the character of the land before the issuance of the patent, yet as the patent shows upon its face that such duty was not performed, *the patentee must be held to have taken it knowing its uncertain and unstable character,*" and the patents the California Supreme Court were referring to were identical with ours, word for word, except in the description of the physical boundaries of the property.

When the land department (and we are speaking independent of agreement and assent), tendered this patent to the defendant railroad company *it was accepted without protest or dissent:* there was no appeal to the secretary of the interior or to the courts but complete acquiesence followed by the defendant railroad company reserving from its grantors and lessees, "in its deeds and conveyances" *all claims of the United States to the above described tract as mineral lands."* (See appendix, Ex. ....)

Suppose now the United States should attempt to recover from those grantees the lands sold to them by the defendant railroad company, will it be held that the defendant railroad company was not authorized to consent to the insertion of such a reservation in its deed and that having accepted the deed with such reservation, the grantee may now repudiate and is not estopped as denying as against the United States that the reservation in its deed from the defendant railroad company is illegal? And will it be contended here that such reservation having been inserted in such deeds by express agreement that either party may now contend that as against the United States the reservation in the deed is nugatory? And if it be not nugatory does not the legal title to the mineral subdivisions of the land conveyed remain in the United States?

And if the legal title remain in the United States are not the mineral subdivisions open to location under the mining laws of the United States? Otherwise, we submit, words have no meaning or are subject to arbitrary and unnatural ruling so that the law may move in its mysterious way its wonders to perform.

Recently the N. P. R. R. Co. (1911) returned to the land department a patent containing a reservation of known and unknown mineral lands and the N. P. R. R. Co. refusing to accept the patent returned to the land department asking for a corrected patent to its co-defendant or other grantee which conveyance contained (as they all did until about January 1, 1905) the phrase: "Reserving all claim of the United States to the above described tract as mineral lands," the railroad company contending the mineral exception was void, as, amongst other reasons, the land passing to the N. P. R. R. Co. under its grant had, pursuant to the specific direction of congress, been examined, determined and classified as mineral or agricultural land and the N. P. R. R. Co. contended that under such circumstances the insertion of the mineral exception was unauthorized and in a communication to the secretary of interior on the ..... day of ....., 1911, Attorney General Wickersham instructing that

the insertion of the mineral exception be contained in railroad land grants pointed out that railroad land grant claimants if not *satisfied* with the patents *tendered* them had their remedy of mandamus. This defendant railroad company has such a remedy but never sought it!

Counsel may argue that the jurisdiction of the land department over the land in controversy ceased on the issuance of a patent and it would be futile to ask the land department to again take up the question or to ask the land department to issue a proper patent. This court has *never decided* that in case of such a patent as ours the land department has lost jurisdiction of lands mineral in character. No court has held so; Secretary Hoke Smith did hold so in *Courtright v. W. C. R. R. Co.* but his reasoning is inexplicable and he was proceeding under his announced theory that the railroad company took its title by the grant, which is denied here by the defendant railroad company and if Secretary Smith was right the defendant railroad company is necessarily wrong.

We must anticipate all possible conjectures on part of the defendants and therefore will take this part of the subject up in an affirmative way. We say:

IT WAS COMPETENT FOR THE DEFENDANT RAILROAD COMPANY TO ASSENT AND AGREE, IN VIEW OF THE NON-ANTECEDENT EXAMINATION AND LACK OF DECISION OF THE QUALITY OF THE LAND, THAT THE EXCEPTED PATENT SHOULD ISSUE UNDER WHICH THE LEGAL TITLE OF MINERAL SUBDIVISIONS SHOULD REMAIN IN THE UNITED STATES, AND IT WAS COMPETENT FOR THE UNITED STATES TO ISSUE SUCH A PATENT UNDER SUCH AN AGREEMENT.

Counsel in the courts below contended that the grant was a "contract" between the United States and the defendant railroad and that under the contract the railroad company was entitled to a free and clear patent pursuant to the terms of the joint resolution of June 28, 1870, for each constructed and equipped section of twenty-five miles and, consequently, the agents of the government had not the right to include in the contract any exceptions whatsoever, all of which, if true, does not alter the fact that the railroad company was in no instance authorized to ask or to receive mineral lands under the "contract." Then again there is no restraint on the part of the United States to enter into any contract is sees fit to enter and we are willing to agree that the patent is a contract.

The law required and the defendant railroad knew that under the "contract" the quality of the land should be primarily determined by the land department before the patent should issue based on a judgment of the land department that the quality of the land had been determined to be non-mineral; and the defendant railroad company knew that the lands in controversy were mineral, that they were covered by valid, subsisting, recorded mining locations and, therefore, we urge that it was competent for the United States and the defendant railroad company should agree that the patent *or contract* that was about to issue should not include lands known to be mineral, or lands covered by prior valid, subsisting recorded locations or lands which had not been examined by the land department and determined not to be non-mineral in character.

Prior to that time the congress had forfeited the land grant of the defendant railroad company as to lands not earned under the grant and had directed the secretary of the interior to "adjust" the grant in accordance with the decisions of this court and in this instance the grant was "adjusted" pursuant to agreement that owing to the existing conditions the patent which the defendant railroad with full knowledge of physical conditions, had applied for, should contain an

exception of "all mineral lands," which included lands *known* to be mineral, lands held under prior mining locations and *unknown* mineral lands. The agreement was equitable and just; there was a *lieu limit twenty* miles in width and two hundred and fifty miles in length in which the defendant railroad had, and still has, the right to be compensated for lands known to be mineral, or covered by mining locations or land subsequently found to be mineral and the area thus open to such compensatory selection on part of the defendant railroad company aggregated approximately *six million acres* or an amount equal to the primary grant as under the construction of the grant by the land department the defendant railroad company was not limited to odd numbered sections in the lien limits and even if it was, the defendant railroad company would still have three million acres to make its lien selections from.

Take for instance the patent under consideration which called for 440,000 acres of land: the length of road constructed and to which the patent applied was *forty miles* which under the most favorable construction of 12,800 acres per mile, would entitle the railroad company to five hundred and twelve thousand acres of land, with the lieu limits adjacent to that forty mile construction that contained, subject to the call of the defendant railroad com-

pany, 483,000 acres of land! and which *is still subject to the call of the railroad company.*

The principle of the right of the United States to trade and deal in equity for its interests and the interests of its citizens is well exemplified in the dealings between the United States and the Santa Fe Railway System, under the forest reserve lieu right statutes.

That railroad company claimed under a grant from the congress about two million acres of land situate in Arizona and later the president by proclamation pursuant to congressional authority created a forest reserve, the boundaries of which embraced the railroad lands and thereupon the railroad company asserted the right to exchange, under the previous forest reserve lieu act, such lands for other lands of the public domain but the exchange was only completed by the making of an agreement to the effect that a portion of those exchange rights should only be exercised on a limited portion of the public domain while the forest lieu act made no restriction in that regard whatever, and later, and when the forest lieu act has repealed the legality of the Santa Fe, agreement was recognized by the congress.

It may be asked by the defendant if it be true as we contend why did not the acceptance of the excepted patent by the

patentee in the *Deffebach v. Hawke case* constitute an estoppel against the grantee or patentee in that instance?

The answering reasons are obvious as the record in that case discloses that the placer mining locator had duly complied with the law and the land department had antecedently determined that he was entitled to all the land applied for including the *entire surface* of the claim and consequently to *limit* the grant by taking away all or a portion of the surface of the land would be illegal and contrary to the provisions of the law in regard to the placer mining law and the patentee had no *lieu* rights which would afford him compensation elsewhere and finally there was *no* suggestion in the record of the case or in the opinion of the court or in the arguments of counsel that the illegal and unauthorized exception which limited the grant and which did not give expression to the intent of the predicating statute had been inserted pursuant to the assent and agreement of the parties: and the further answer is that the patent in this suit having issued pursuant to the assent of the parties the patent under the rule of property is to be construed in light of the rule of property prevalent in the state of California and in which state as stated Mr. Justice Fields when chief justice of the Supreme Court of that state (*Fremont v. Flower, supra*) is that a patent is

subject to the same rule of construction as applies to conveyances between individuals and counsel cannot contend as between individuals the agreed exception of mineral land in a deed would not be lawful and valid!

The Act of March 3d, 1849, vested complete jurisdiction over mines and public lands in the secretary of the interior and the various adjustment acts authorized him to adjust the railroad land grants which had been forfeited with *only* one restriction and that has no adjustment should be so construed as to *enlarge* the amount of lands to which any railroad grantee would be entitled to receive under any of the land grant and it must, we submit, be admitted that he was authorized to make any adjustment *that might even limit or reduce the quantity or quality of a grant but could not enlarge or enhance said grants!*

Counsel in the courts below contended that their forfeited grant was "adjusted" by the secretary of the interior pursuant to the "adjustment acts," and such contention may only lead to one true conclusion and that is the secretary of the interior within the limits of the decisions of this court was entitled to bargain with the defendant railroad company and independent of all other reasons *was* entitled to insert the *mineral exception in the grant!* as he *knew* the non-mineral quality of

the land had not been determined and that under no circumstances should mineral lands, except in the right of way, pass to the defendant railroad company.

Counsel contended that under the adjustment acts that any "adjustment" made was final and we so agreed if it gave expression to the intent of the statute and did not enlarge the quantity or quality of the grant.

But independent of any adjustment act we contend that the agreement entered into by the defendant railroad company and the United States was valid and is conclusive of this controversy and precludes the defendants from asserting that the legal title to the lands in controversy passed to it under the grant or patent or from now denying that the legal title not passing the lands were not open to the relocations on which this suit is based. We are aware of the decisions that hold that no illegal or unauthorized or nugatory provision may be inserted in any document by any public officer or that the acceptance of such a document does not bind the accepting party to a performance of the illegal or void conditions and prejudicing restriction.

The same rule applies to deeds and testamentary devises, to deeds of trusts, but has no application to a land grant patent containing an exception that only gives

expression to the predicating statutes and which under no circumstances may deprive the railroad company of that to which under the grant it was entitled to receive and which when said right is lost by statutory reasons may be compensated through the lieu *indemnity* lands—lands termed by the law as indemnity lands.

Without any mental reservation we admit the United States could not force on the railroad grantee a patent that would limit the grant and even if it refused to receive a limited patent it could, absolutely independent of a patent and of any arbitrary or illegal action on part of the secretary of the interior protect any possessory title it had through the action of the courts and we assume that this court will take judicial cognizance of the fact that the land grant railroads sold millions and millions of acres of land within their primary grants many years before the issuance of any patent!

We admit as a matter of course that if the insertion of the mineral exception took away by the patent what otherwise would have passed by the grant would render the mineral exception nugatory and void, but such is not the case here.

We admit as of course that even if the patent issued and the mineral exception was inserted therein pursuant to the assent and agreement of the defendant

railroad company that the same would be nugatory if it violated the canons of morality or the public faith, but of course no such condition exists and we now come down to the last contention of the defendant railroad in regard to the mineral exception, namely, that no consideration flowed to the patentee for the insertion of the mineral exception and therefore the defendant railroad may not be bound by the mineral exceptions!

To such extraordinary proposition we reply, in the first instance, that is difficult to conjecture just what "consideration" should have flowed to the defendant railroad for giving up and surrendering "mineral lands" which under no circumstances was it entitled to receive! And yet the grave pretension was made by counsel in the courts below that the mineral exception was void because the defendant railroad company received no consideration from the United States for the *"mineral exception."*

As a matter of law the defendant railroad company under no circumstances would be entitled to a consideration. It had built a railroad and as a gift the United States was giving it a grant of millions of acres of lands. To obviate some public criticism at the time the grant made some reference to the carrying of troops and munitions of war but the stub railroad of the defendant running from

Goshen Junction to Alcade and from San Jose to Tres Pinos would not be very available for the transportation of troops and munitions of war even at Spanish-American railroad war rates, for if any troops were dumped into the Coalinga desert they could only consume the munitions of war and then return to Goshen Junction and await some more munitions of war.

Counsel attempted in view of such provision to contend that the defendant railroad company for a construction of its railroad and in payment therefor the United States was to turn over to the railroad company the land designated in the grant!

We shall not consume any space in making reply thereto but will content ourselves with saying that if such be the fact the government was sadly cheated and that the treasury records will disclose that the defendant railroad company has been, to say the least and to speak mildly, well paid for its transportation of "mails, troops and munitions of war."

The grant did not contain one single element of a grant, it was a gift, a gift of an empire to a railroad and from which all the profit has flowed to the railroad company and now it urges it may retain mineral lands worth half a billion of dollars because it received "no consideration" for its agreement that it

should not receive what the law said it should not and could not receive!

Finally, it must be remembered that in inserting the mineral exception the department was acting on a construction of a statute which it was called on to construe and it followed a construction that was in force for at least *thirty-seven years* and even if the statute is ambiguous or doubtful in such regard the contemporaneous construction of the statute by the executive officers, coupled with the assent and acquiescence, whose duty it is to construe it, or those who have been called upon to carry it into effect, is entitled to great respect and should control the construction of the statute by the courts.

United States v. Moore, 95 U. S. 760;
U. S. v. B. & M. R. Co., 98 U. S. 336;
U. S. v. Graham, 110 U. S. 219;
Brown v U. S., 113 U. S. 568;
The Laura, 114 U. S. 413;
Sub. nom. Pollock v. Bridgeport, 29 L. Ed. 147, 5 Sup. Ct. Rep. 181;
U. S. v. Philbrick, 120 U. S. 52;
Robertson v. Downing, 127 U. S. 613;
Hastings etc. v. Whitney, 132 U. S. 365;
Heath v. Wallace, 138 U. S. 578;
Penmoyer v. McConnaughy, 140 U. S. 23;
Barden v. N. P. R. R. Co., 154 U. S. 288.

We close this brief and submit the question in controversy to this court with citing the following cases, all of which uphold the right of the United States to enter into agreements not contrary to good morals or public policy or the law and which cases in every instance uphold our contentions.

EDMUND BURKE,
Attorney in Pro. Per.

Owing to an error of the printer the matter following the last paragraph was omitted and is presented in a supplemental brief.

Appendix.

Exhibit "A."

In the Circuit Court of the United States in and for the Southern District of California, Northern Division.

Edmund Burke, complainant, v. The Southern Pacific Railroad Company, The Kern Trading and Oil Company *et al.*, defendants.

Amended Bill of Complaint.

To the Judges of the Circuit Court of the United States for the Southern District of California:

Edmund Burke, a citizen and resident of the state of California, brings this his bill of complaint against the above-named defendants. And thereupon your orator complains and says:

1. That at all times hereinafter mentioned, the defendant, The Southern Pacific Railroad Company, was and is a corporation, created and existing pursuant to the laws of the state of California, and had and has its principal office at the city of San Francisco, in the state of California.

2. That The Kern Trading and Oil Company, for the last five years has been, and now is a corporation created and existing pursuant to the laws of the state of California, and has its principal office at the city of San Francisco, in the state of California, and always has been, and now is wholly owned, dominated, controlled and operated by The Southern Pacific Railroad Company, for the ulterior purpose of doing certain things which, by law, the said The Southern Pacific Railroad Company is prohibited from doing, to-wit: Mining for petroleum and other minerals, and dealing with the same as a commodity, and claiming, for the benefit of The Southern Pacific Railroad Company, as an alleged lessee of the said Southern Pacific Railroad, the certain prohibited and interdicted min-

eral lands hereinafter referred to; the said The Kern Trading and Oil Company does the things and makes the illegal claims and demands hereinafter set forth, against the complainant, and the lands herein described, and all of which is to the prejudice and damage of this complainant, as hereinafter appears and is set forth.

3. That the complainant, subject only to the paramount title of the United States, is the owner and entitled to the possession of all of sections 11, 13, 23, 33, township 19 south, range 15 east, M. D. B. & M., Fresno county, California, and all of section 5 in township 20 south, range 15 east, M. D. B. & M., Fresno county, California, as placer mining claims, under the mining laws of the United States, to the extent of one-tenth (1/10) undivided interest in each and all of the same.

4. That all of the above-described lands were known mineral lands and have been subject to location under the mining laws of the United States and under the local rules, customs and usages prevailing in the state of California, and the mining district in which said lands are situate, since the 1st day of January, 1865.

5. That all of the same, and each and every legal subdivision thereof now is and at all times has been mineral land of great value, containing minerals in commercial quantities, and all of which was known to the above-named defendant, The Southern Pacific Railroad Company, its agents, officers and servants, since prior to the 1st day of January, 1865.

6. That on July 27th, 1866, the congress of the United States passed a certain act making a grant of the public lands of the United States to the defendant, The Southern Pacific Railroad Company, and that section 3 of said Act of July 27th, 1866, is in the words and figures as follows, to-wit:

"Section 3. And be it further enacted, that there be and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph lines to the Pacific Coast, and to secure the safe and speedy transportation of mails, troops, munitions of war and public stores, over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections of land per mile on each side of said railroad, whenever it passes through any state, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the commissioner of the general land office; and whenever prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers or preempted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, all under the direction of the secretary of the interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers; provided further, that the railroad company receiving the previous grant of land may assign their interest to said Atlantic and Pacific Railroad Company, or may consolidate, confederate, and associate with said company, upon the terms named in the 1st and 17th sections of this act; provided, further, that all mineral lands be, and the same are hereby excluded from the operations of this act, and in lieu thereof, a like quantity of unoccupied and unappropriated agricultural lands in odd-num-

bered sections, nearest to the line of said railroad, and within twenty miles thereof, may be selected as above provided. And provided further, that the word 'mineral' when it occurs in this act, shall not be held to include iron and coal. And provided, further, that no money shall be drawn from the treasury of the United States to aid in the construction of the said Atlantic and Pacific Railroad."

7. And your orator further says that section 18 of said act is in the words and figures following, to-wit:

"Section 18. And be it further enacted, that The Southern Pacific Railroad Company, a company incorporated under the laws of the state of California, is hereby authorized to connect with the said Atlantic and Pacific Railroad, formed under this act, at such point near the boundary line of the state of California, as they shall deem most suitable for a railroad line to San Francisco, and shall have uniform gauge and rate of freight and of fare with said road; and in consideration thereof to aid in its construction shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on like regulations, as to time and manner, with the Atlantic and Pacific Railroad herein provided for."

And that a construction and interpretation of sections 3 and 18 of said act, and of all acts and joint resolutions amendatory thereof, and supplemental thereto, covering and embracing the lands herein described, is involved in this suit and requires the construction of the court.

8. That thereafter, and by virtue of a joint resolution of congress, approved June 28th, 1870, certain conditions were expressly imposed and prescribed, by and under which said railroad and telegraph lines should be constructed, and under what terms and conditions and limitations,

patents should be issued by the secretary of the interior to defendant, The Southern Pacific Railroad Company, for said granted lands, and said joint resolution was, and is, in the words and figures as follows, to-wit:

"Be it resolved by the senate and the house of representatives of the United States of America in congress assembled, that The Southern Pacific Railroad Company of California may construct its road and telegraph line, as near as may be, on the route indicated by the map filed by said company in the department of the interior on the third day of January, eighteen hundred and sixty-seven; and upon the construction of each section of said road, in the manner and within the time provided by law, and notice thereof being given by the company to the secretary of the interior, he shall direct an examination of each such section by commissioners to be appointed by the president, as provided in the act, making a grant to said company, approved July twenty-seventh, eighteen hundred and sixty-six, and upon the report of the commissioners to the secretary of the interior that such section of said railroad and telegraph line has been constructed as required by law, it shall be the duty of the said secretary of the interior to cause patents to be issued to said company for the sections of land coterminus to each constructed section reported on as aforesaid, to the extent and amount granted to said company by the said Act of July 27th, 1866, expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act, approved July 27th, 1866."

9. That on July 10th, 1894, a patent purporting to convey certain lands, yet excepting and excluding the above described lands, issued from the United States to The Southern Pacific Rail-

road Company, and was accepted by the said The Southern Pacific Railroad Company, and recorded in the office of the recorder of the county of Fresno, in the state of California, on the .... day of ....., 1894, by said The Southern Pacific Railroad Company; that attached hereto is a copy of said alleged patent, marked exhibit "A," omitting only the description of other lands not involved herein, and which is hereby referred to and made a part of this bill.

10. That prior to the 9th day of July, 1892, all of the said lands mentioned and described herein were covered by valid subsisting mining locations made theretofore by divers citizens of the United States, pursuant to the mining laws of the United States, and said several and divers mining locations were made by said divers citizens of the United States after a discovery of mineral on each of said mining claims embraced therein and at the time of the issuance of said alleged patent were not public lands subject to sale and disposal, or within the jurisdiction of the interior department of the United States and said lands were not the property of the United States, and not within the power of the United States to dispose of the same, but were segregated from the public domain, the beneficial title thereto being in said mining locators, and the legal title thereto being held in trust by the United States for said locators, or for their successors, heirs or assigns.

11. That all of said mining locations, prior to the issuance of said patent, and prior to the application of the said The Southern Pacific Railroad Company for patents, as hereinafter set forth, had been duly recorded in the office of the recorder of the mining district of Coalinga, in the county of Fresno, in the state of California, of all of which the said The Southern Pacific Railroad Company, its officers, agents and serv-

ants had due notice; that said Coalinga mining district had been organized theretofore in pursuance to law, and was the proper place for record of said mining locations, all of which the said The Southern Pacific Railroad Company had knowledge prior to the issuance of said alleged patent.

12. That notwithstanding said knowledge and notice, and notwithstanding that the said The Southern Pacific Railroad Company, its officers, agents and servants, well knew all the lands herein described were mineral lands, and lands on which there were valid subsisting mining locations of record as aforesaid, and that the said The Southern Pacific Railroad Company was not entitled to a grant of the same, and that the said lands were precluded from the operation of said grant, the said The Southern Pacific Railroad Company did falsely and corruptly cause one Jerome Madden, its then land agent, on or about the 9th day of May, 1892, to make, and he did make, the certain false, wicked, corrupt and fraudulent affidavit and application in manner following, that is to say:

"State of California, City and County of San Francisco.

I, Jerome Madden, being duly sworn, depose and say that I am the land agent of The Southern Pacific Railroad Company; that the foregoing lists of land which I hereby select, is a correct list of a portion of the public lands claimed by the said Southern Pacific Railroad Company, as inuring to it, to aid in the construction of the railroad of said company, from a point in the northeast quarter of section 2, township 19 south, range 20 east, M. D. B. & M., to Alcalde, for which a grant of lands was made by the acts of congress approved July 27, 1866, July 25, 1868, and June 28, 1870, as aforesaid, and that said lands are vacant, unappropriated,

and are not interdicted mineral or reserved lands, and are of the character contemplated by the grant, being within the limits of twenty miles on each side of the line of route for a continuous distance of forty 559/1000 miles, being for the 9th and 17th sections of said road, starting from a point in the northeast quarter section 2, township 19 south, range 20 east, M. D. B. & M., and ending at a point in the northeast quarter section 23, township 21 south, range 14 east, M. D. B. & M.

(Signed) JEROME MADDEN.

Sworn to and subscribed before me this 9th day of May, 1892. Witness my hand and notarial seal.

E. B. RYAN,

Notary Public in and for the City and County of San Francisco, in the State of California."

13. That thereafter, and pursuant to said affidavit so made and aforesaid, for the purposes aforesaid, there was issued to The Southern Pacific Railroad Company the alleged patent hereinbefore referred to.

14. That on the ..... day of ....., 1894, the Honorable G. W. Lamoreaux, commissioner of the general land office, and Honorable Hoke Smith, secretary of the interior, approved said application, but therein it was expressly provided that there should be excluded from the approval, and from the transfer in the patent that was to issue:

"All mineral lands should any such be found in the tracts aforesaid, but the exception, according to the terms of the statute was not to be construed to include iron and coal."

15. And thereupon the said alleged patent issued as aforesaid.

16. Your orator further says and shows unto Your Honors that the defendant, The Southern

Pacific Railroad Company, did assent to all of the terms and conditions of said act of congress, approved July 27th, 1866, and the joint resolution of June 28th, 1870, and they did wholly submit to and accept the terms and conditions of said acts, and did agree that The Southern Pacific Railroad Company, and its assigns and successors and all persons then or now in privity with it, should recognize, respect and be held by the reservation, exception and exclusion of all mineral lands contained in said grant, and that such alleged patent containing such exclusion, exception and reservation, exception and exclusion of all mineral lands contained in said grant, and that such alleged patent containing such exclusion, exception and reservation did not convey to the said defendant, The Southern Pacific Railroad Company, the lands hereinbefore described, or any part thereof, and that said exception, exclusion and reservation was a term of description which was accepted by the said The Southern Pacific Railroad Company at the time of the issuance of said patent.

17. That the lands in controversy are not within the limits of twenty miles of the line of the railroad of said defendant, The Southern Pacific Railroad Company, and are not coterminus with any completed twenty-five mile section of the line of railroad of said The Southern Pacific Railroad Company, and that the railroad, to aid in the construction of which said grant of lands was made, has never been completed, and that all the lands herein described lie opposite to and coterminus with an uncompleted twenty-five mile section of said railroad; and in respect to this subject, your orator alleges that a construction by this court of sections 4 and 6 of the said Act of July 27th, 1866, is involved. Your orator alleges that said patent was issued without jurisdiction on the part of the land office

of the United States and in contravention of section 4 of said Act of July 27, 1866, and said lands were certified and approved by the secretary of the interior, and said alleged patent issued, wholly without authority of law and in contravention of section of the Act of March 3d, 1887, and a construction of which act last aforesaid is involved in this suit.

18. Further reiterating all the foregoing allegations, complainant alleges that said grant and patent did not convey said sections, or any part thereof, and said patent to the said The Southern Pacific Railroad Company was issued by the United States, and accepted by the said The Southern Pacific Railroad Company with said exception and reservation, expressly excepting, precluding and excluding all mineral lands that might at any time be found therein, and that the said The Southern Pacific Railroad Company accepted the same with such exception and reservation. And your orator further alleges that at the time of the making of said grant, and the issuance of said patent, and prior thereto, and ever since, said lands and sections and each legal subdivision thereof, were mineral and not agricultural in their character, and that the same was a fact at all of said times of common and current observation, and known to the said The Southern Pacific Railroad Company at all the times herein mentioned, and that, as your orator is informed and believes, and therefore avers, prior to the issuance of said alleged patent, the said lands have been examined by the department of the interior, through its geological department, in manner and form of law, and determined to be mineral lands, and not agricultural in their character, and more valuable for mining than for agricultural purposes.

19. That prior to the 10th day of July, 1894, and subsequent to the 1st day of November,

1891, and on or about the 22d day of May, 1892, the said The Southern Pacific Railroad Company made the application for patents herein referred to, to the secretary of the interior, for said sections of land under said congressional act, as alleged in the said petition therefor, and for all of the said sections of the public land as therein set forth, and on July 10th, 1894, the said The Southern Pacific Railroad Company received and accepted from the United States, and caused to be recorded in the office of the recorder in the county of Fresno, the certain patent as hereinbefore stated, and the said The Southern Pacific Railroad Company under said patent does now assert ownership in fee to each and every legal subdivision thereof, but has never been at any time, or now is in the actual, open, peaceable, notorious, public, and physical possession of any part of the same, and neither at the time of the commencement of this action, nor at any other time were any of the defendants in the actual, open, peaceable, notorious, public and physical possession of the same, or any part of the same, but at all times, since the making of said grant of July 27th, 1866, the said lands have been wild, open, unoccupied, unappropriated lands, free from any physical sign of any claim of domination or ownership by any of the defendants herein.

20. And your orator further alleges that at no time did the locators of said mining lands, who made mining locations on the same prior to the 10th day of July, 1894, receive notes of the said application of the said The Southern Pacific Railroad Company for said patent, and there was no notice of hearing in the land office, and no opportunity was given to the said locators or any of them, to contest the application of the said The Southern Pacific Railroad Company for a patent to said land as aforesaid, and there was

no hearing in the land office, or in the department of the interior, to determine the mineral or agricultural character of any of the legal subdivisions of the land herein described, and that the said patent issued without any such determination, and said patent expressly reserving the determination of the quality of said lands for the subsequent consideration of a court of equity having jurisdiction over the subject matter of the same. And the said patent issued while the said mining locations and claims were in full force and effect and constituting a segregation, exception and reservation of the lands herein described and so located and claimed as aforesaid, and at a time when the locators and claimants were the possessory owners of the same, and all of said lands, and each and every part of the same, were at said time within six miles of divers other mining locations, made pursuant to the mining laws of the United States, all of which facts were then well known to the officers, servants and agents of said The Southern Pacific Railroad Company, and especially to the land agent of the said The Southern Pacific Railroad Company, and to its said land agent, that said sections of the public land herein described were not agricultural in character, or more valuable for agricultural than for mining purposes, or that they were of the character contemplated by the said grant to be passed to the said The Southern Pacific Railroad Company, and that all of the same were subject to and covered by valid subsisting mining locations, made by divers qualified locators under the mining laws of the United States and were within six miles of divers other mining locations on public lands, all of which facts were then knowingly, falsely, fraudulently and corruptly withheld by the said The Southern Pacific Railroad Company, its officers, agents and servants, from the

knowledge of the officers of the land department of the United States, for the purpose of deceiving the officers of the land department of the United States in relation to the mineral and non-agricultural character of said lands, and of the valid and subsisting mining locations thereon as aforesaid. And by reason of the said false, fraudulent and corrupt representations by said persons, and in the manner aforesaid, that said applied for sections of the said land were non-mineral, and agricultural in their character, and that there were no mining locations within six miles of any of said lands, or upon any of the said lands, said patent was issued by the officers of the land department of the United States, in ignorance of the facts, said officers having been deceived by said false and fraudulent representations of the said The Southern Pacific Railroad Company as aforesaid, that said sections were mineral, non-agricultural in their character, and of the character contemplated by the grant, as passing to said The Southern Pacific Railroad Company, and more valuable for mining than for agricultural purposes, and were covered by valid and subsisting mining locations, made pursuant to the mining laws of the United States prior to the time of said *ex parte* application of the said The Southern Pacific Railroad Company for a patent thereto, or were within six miles of other valid and subsisting mining locations made on the public lands of the United States pursuant to the mining laws of the United States, and that at the time of the making of such application for said patent as aforesaid, each quarter section of all of the said sections were, to the knowledge of the said The Southern Pacific Railroad Company, covered by valid subsisting mining locations, made pursuant to the mining laws of the United States, by divers of the above-

named defendants who received no actual or constructive notice of the said false and surreptitious application of the said The Southern Pacific Railroad Company for said patents to said lands, and there was at no time any hearing in the department of the interior to determine the mineral or agricultural character of said lands in said sections, of which said locators of the same, or their successor in interest or privies, or assigns or heirs, or representatives, had any actual or constructive notice or knowledge.

21. Reiterating all the foregoing allegations, complainant alleges that the said The Southern Pacific Railroad Company now claims the fee to said sections by reason of the issuance to it of said patent under said grant, which in fact did not convey the said sections to the said defendant railroad company, but which in express terms of description conveyed only such alternate odd-numbered sections of the public land not mineral, except as to coal and iron, to the amount of ten alternate sections per mile on each side of said railroad on the line thereof nearest to the line of said road and within twenty miles thereof, to be built, maintained and operated by said defendant railroad company between the city of San Francisco and the point of connection with the Atlantic and Pacific Railroad Company near the eastern boundary line of the state of California, which were not sold, reserved, or otherwise disposed of, or to which mining claims had not attached, and yet excluding and excepting all mineral lands, should any such be found in said lands so described in said patent. And which said sections so named as aforesaid were at such time located and claimed mineral lands, and reserved by law from sale or disposal as aforesaid. And this complainant alleges that said patent is null and void, insofar as the claim of title to said sections, or any part thereof,

under said patent is asserted by the said The Southern Pacific Railroad Company, or by The Kern Trading and Oil Company, but that said sections above referred to were reserved, excepted and precluded from the operation of said grant and patent, and that, upon the dates in March, 1909, as hereinafter appears, the said sections were mineral lands of the United States, open to exploration, location, purchase and sale, and that at said time said lands, after examination by the department of the interior had been determined and adjudged as mineral lands, bearing mineral in commercial quantities; that said sections are mineral lands, and have, since July 25th, 1866, been more valuable for mining than for agricultural purposes, and were, previous to March, 1909, formally designated by the department of the interior, after complete and thorough geological examination, to be lands bearing petroleum in commercial quantities.

22. That on the 2d day of March, 1909, all of sections 5, 11, 13, 23, and 33 as above described, were open to location under the mining laws of the United States, the said locators who had made prior locations thereon, having failed to perform, or commence the performance of their annual labor on each or any of the quarter sections thereof for the year 1908, and had not performed the same thereon up to the 3d day of March, 1909, when your complainant, together with the defendants, A. L. Frick, M. J. Frick, S. L. Phillips, E. Phillips, M. E. Wall, B. McGowan, E. M. Dunweedie, entered on said lands and made mining locations on each quarter section thereof, acting as an association of eight persons, pursuant to the mining laws of the United States, and thereby succeeded to all the right, title and interest in and to the quarter section of said section, of the prior mining locators of the discoveries on which said

proper mining locations were predicated, and all of said locations, or duplicates thereof, were duly filed in the office of the recorder of the county of Fresno, in the state of California, on the 6th day of March, 1909.

23. That contemporaneous with the making of said relocations there was a discovery of mineral on each of said locations by said relocators, and prior thereto said land had been properly and legally designated by the department of the interior, as lands bearing mineral in commercial quantities, and more valuable for mining than for agricultural purposes.

24. That the said defendants, in addition to the foregoing, claim to have some right, title or interest, in or to said sections, or to some portion thereof, adverse to complainant, but all of the claims of the said defendants, and each of them, are legally invalid, and said defendants have not, either jointly or severally, any legal right, title or interest in and to said section or any part thereof, or in or to any part of the said mining claims now subsisting on the said sections hereinbefore described.

25. That said patent constitutes a cloud on the title of your complainant in and to the above described land.

26. That the reasonable and market value of each of the said mining claims is upwards of sixty thousand dollars, and that the reasonable and market value of the undivided interest of your orator in each of said mining claims is upwards of six thousand dollars.

27. That irrespective of, and independent of the lands and mining claims described herein, the said The Southern Pacific Railroad Company has elsewhere received from the United States, under said congressional grant of July 27th, 1866, more land than it earned thereunder or was entitled to

receive thereunder, along and coterminus with the line of its railroad as partially constructed between San Jose, California, to Tres Pinos, California, and from Alcalde, California, to Mojave, California, a distance comprising two hundred and fifty-two and four hundred and seventy-nine thousands of a mile and thereby the lands herein described were not within the jurisdiction of the general land office at the date of said patent, the said exhibit "A" to convey to said The Southern Railroad Company, and were precluded from passing thereby or thereunder.

Wherefore, your orator prays that a construction and interpretation be had by this court of sections 3 and 18 of said act of congress, approved July 27th, 1866, and the joint resolution of congress authorizing, instructing and requiring the secretary of the interior of the United States to issue patents to The Southern Pacific Railroad Company, expressly prescribing what said patent should and should not contain, approved June 28th, 1870, and a final order and decree that patent issue, together with the reservation and exception therein contained.

2. That the defendants and each of them be estopped from claiming any right, title, interest or estate in or to any of the lands involved in this suit.

3. That an interlocutory injunction issue by this court against each and all of the defendants herein, and all the persons in privity with them, requiring each and all of them to desist from any interference with the property in dispute, claimed herein by your orator, or the minerals therein under the final determination of this suit, and that at that time said injunction be made perpetual.

4. That the complainant have such other and further order and relief as may be equitable and just.

5. That a writ of subpoena of the United States issue, directed to the defendants herein, commanding them on a certain day, and under a certain penalty, to be and appear in this court, and there to answer, without oath, the premises, and to stand by and abide such decree and order as may issue against them.

And further your orator sayeth not.

EDMUND BURKE,
In Pro. Per.

State of California, County of Los Angeles.

Edmund Burke, being duly sworn, deposes and says that he is the complainant above named; that he has read the foregoing bill, and knows the contents thereof; that the same is true, of his own knowledge, except as to the matters therein alleged on information and belief, and as to those matters he believes them to be true.

EDMUND BURKE.

Subscribed and sworn to before me, this 26th day of September, 1910.

J. S. MCKNIGHT,
Notary Public in and for the County of Los Angeles, State of Cal.

EXHIBIT "A" (TO AMENDED BILL).

PATENT.

To All to Whom These Presents Shall Come, Greeting:

Whereas by the act of congress approved July 27th, 1866, and joint resolution of June 28th, 1870, "to aid in the construction of a railroad and telegraph line from the states of Missouri and Arkansas to the Pacific Coast," and to secure to the government the use of the same for postal, military and other purposes, authority is given to the Southern Pacific Railroad Company of California, a corporation existing under the laws of the state, to construct a railroad and telegraph

line, under certain conditions and stipulations expressed in said act, from the city of San Francisco to a point of connection with the Atlantic and Pacific Railroad near the boundary line of said state, and provision is made for granting to the said company, "every alternate section of public land designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of twenty miles on each side of said road" "not sold, reserved, or otherwise disposed of by the United States, and to which pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed."

And whereas, official statements from the secretary of the interior, have been filed in the general land office, showing that the commissioners appointed by the president under the provisions of the fourth section of the said act of July 27, 1866, have reported to him, that the line of said railroad and telegraph from San Jose to Tres Pinos and from Alcalde to Mojave, together comprising two hundred and fifty-two miles and four hundred and seventy-nine thousandths of a mile has been constructed and fully completed and equipped in the manner prescribed by said act of July 27, 1866, and accepted by the president.

And whereas the following tracts have been duly listed under the act aforesaid by the duly authorized land agent of the said Southern Pacific Railroad Company, as shown by his original lists of selections approved by the local officers and on file in this office.

And whereas the said tracts of lands lie coterminus to the constructed line of said road and are particularly described as follows, to-wit:

South of base line and east of Mt. Diablo Meridian, state of California.

Township nineteen, range fifteen.

All of section 33 containing 640 acres.
(With other land.)

The said tracts as described in the foregoing make the aggregate area of 440,900.85 acres.

Now, know ye, that the United States of America, in consideration of the premises and pursuant to the said acts of congress, have given and granted and by these presents do give and grant unto the said Southern Pacific Railroad Company of California, and to its successors and assigns, the tracts of land selected as aforesaid and described in the foregoing. Yet excluding and excepting "All mineral lands," should any such be found in the tracts aforesaid, but this exclusion and exception according to the terms of the statute, shall not be constructed to include "coal and iron lands."

To have and to hold the same with the appurtenances unto the said "Southern Pacific Railroad Company" and to its successors and assigns forever.

In testimony whereof, I, Grover Cleveland, president of the United States, have caused these letters to be made patent and the seal of the general land office to be hereunto affixed.

Given under my hand at the city of Washington, this the tenth day of July in the year of our Lord one thousand eight hundred and ninety-four and the independence of the United States, the one hundred and nineteenth.

By the President: GROVER CLEVELAND,
(Seal) M. KcKEAN,
Secretary.

L. Q. LAMAR,
Recorder of the General Land Office.

Recorded in Vol. 14, pp. 103 to 142, inclusive. Patent No. 22. Recorded Feb. 16, 1895, at 8.27 o'clock a. m. in Vol. P. of Patents, page 288 *et seq.*, Fresno county records.

(Endorsed): In equity, No. 192, United States Circuit Court, Southern District of California, Northern Division. Edmund Burke *et al.*, complainant, vs. The Southern Pacific Railroad Company *et al.*, defendants. Amended bill. Original. Filed Oct. 31, 1910. Wm. M. Van Dyke, clerk; Chas. N. Williams, deputy. Edmund Burke, *in pro. per.*, 616-17 Central Bldg., Los Angeles, California.

EXHIBIT "B."

(JOINT AND SEVERAL DEMURRER OF S. P. R. R. Co. *et al.* TO AMENDED BILL.)

Case No. 192.

United States Circuit Court, Ninth Circuit, Northern Division of the Southern District of California.

IN EQUITY.

Edmund Burke, complainant, vs. Southern Pacific Railroad Company *et al.*, defendants.

The joint and several demurrer of the defendants Southern Pacific Railroad Company and Kern Trading and Oil Company, to complainant's amended bill of complaint herein.

These defendants, Southern Pacific Railroad Company and Kern Trading and Oil Company, jointly and severally, by protestation, not confessing or acknowledging all or any of the matters or things in the said amended bill of complaint to be true in such manner and form as the same are therein set forth and alleged, demur thereto and to the whole thereof and for cause of demurrer show:

1st. That the said amended bill of complaint does not state a cause of action, or cause of suit, against these defendants, or any of them, within the jurisdiction of this court.

2nd. That the said amended bill of complaint

does not set forth or show any matter, equity, or cause, entitling complainant to file or maintain the same against these defendants, or any of them.

3rd. That the said amended bill of complaint does not set forth or show any matter, equity, or cause, entitling complainant to the discovery thereby sought, requiring or prayed, or to any discovery whatsoever, of or from these defendants, or any of them.

4th. That the said amended bill of complaint does not set forth or show any matter, equity, or cause, entitling complainant to the relief thereby sought or prayed, or to any relief whatsoever, of or from these defendants, or any of them.

5th. That it appears by the allegations of the said amended bill of complaint that any cause of action, or cause of suit, shown or sought to be shown thereby, is barred by the first section of the act of congress, approved March 2d, 1896, entitled "An act to provide for the extension of time within which suits may be brought to vacate and annul land patents, and for other purposes," printed and published in volume 29, on pages 42 and following, United States Statutes at Large.

6th. That it appears by the allegations of the said amended bill of complaint that any cause of action, or cause of suit, shown or sought to be shown by the said amended bill of complaint is barred by:

(a) The provisions of section 318 of the Code of Civil Procedure of the state of California.

(b) The provisions of section 319 of the Code of Civil Procedure of the state of California.

(c) The provisions of section 320 of the Code of Civil Procedure of the state of California.

(d) The provisions of section 321 of the Code of Civil Procedure of the state of California.

(e) The provisions of section 338 of the Code of Civil Procedure of the state of California.

(f) The provisions of section 343 of the Code of Civil Procedure of the state of California.

7th. That it appears by the allegations of the said amended bill of complaint that any cause of action, or cause of suit, shown or sought to be shown by the said amended bill of complaint is barred by the long delay and laches of the complainant.

Wherefore, these defendants, jointly and severally, pray the judgment of this Honorable Court whether they, or any of them, shall make any further or other answer to the said amended bill of complaint, or to any part thereof, or to any matters or things therein set forth; and further pray to be hence dismissed, with their costs in this behalf sustained.

GUY V. SHOUP and
D. V. COWDEN,
Attorneys for the Defendants.

WM. SINGER, JR.,
Counsel for the said Defendants.

State of California, City and County of San Francisco,—ss.

G. L. King makes solemn oath and says: That he is the secretary of the Southern Pacific Railroad Company, named as one of the defendants in and to the foregoing joint and several demurrer; and that the said demurrer is not interposed for delay.

G. L. KING.

Subscribed and sworn to before me on November 9th, 1910.

(Seal) E. B. RYAN,
Notary Public in and for the City and County of San Francisco, State of California.

I hereby certify that, in my opinion, the foregoing joint and several demurrer is well taken in point of law.

WM. SINGER, JR.,
Counsel for said Defendants.

(Endorsed): No. 192. U. S. Circuit Court, Southern District of California, Northern Division. Edmund Burke vs. Southern Pacific Railroad Co. et al. Joint and several demurrer of S. P. R. R. Co. and Kern Trading & Oil Co. to complainant's amended bill. Filed Nov. 11, 1910. Wm. M. Van Shoup and D. V. Cowden, attorney for defendants. Room 842, Flood Building, San Francisco.

EXHIBIT "C."

(Opinion in Roberts *et al.* v. S. P. Co. *et al.*)

In the United States Circuit Court in and for the Southern District of California, Northern Division.

George D. Roberts *et al.*, plaintiffs, v. Southern Pacific Company *et al.*, defendants.

Stripped of the mass of irrelevant and redundant matters contained in the pleadings, the case presented is this: Can a citizen of the United States, or one having declared his intention to become such, lawfully enter upon and claim as mineral ground land theretofore patented by the government to a railroad company under a congressional grant, such patents, after describing the land thereby conveyed, containing the clause, "Yet excluding and excepting 'all mineral lands,' should any such be found in the tracts aforesaid. But this exclusion and exception, according to the terms of the statute, shall not be construed to include 'coal and iron land.'"

The complainants' alleged rights to the lands in question in this suit were, according to their express allegation, not acquired until fifteen years after the issuance of patents to the Southern Pacific Railroad Company therefor, at which tim they claim to have made mineral locations upon them, and by this suit, the nature of which is variously characterized by their counsel, they

ask the court to protect their alleged rights as such mineral locators, by some sort of injunctive process, by "controlling" the patents which were issued by the government, and which they expressly allege conveyed the legal title to the land to the grantee therein named.

If the above-quoted clause inserted in the patents had the effect of excepting from the lands described in the granting clause thereof all of such lands in which mineral might thereafter be found, the discovery of mineral in the lands in suit by the complainants, if such has been made as alleged, fifteen years after the issuance of the patents, would undoubtedly defeat the grant under which the defendants hold, for the reason that the clause is without limitation as to time, and a determination by a court or jury, as the case might be, at any subsequent date, however remote, that any of the land described in the granting clause of the patents had turned out to be mineral land, would thereby necessarily determine that such land was never within the terms of the railroad grant made by congress, notwithstanding the fact that the officers of the government, charged with the duty of inquiring into and determining the question and of issuing the government patent for the lands granted, had issued such conveyance. A mere statement of the necessary consequences of the complainants' contention is enough to show that it cannot be sound. It would make of the patents a delusion and a snare instead of a muniment of title designed for the peace and security of those holding under them. Undoubtedly, if the lands in suit were known to be mineral lands at the time they were applied for by the railroad company under the congressional grant to it, and if the patenting of them was, as alleged by the complainants, procured by means of the false affidavit of its land agent, or through any other

fraud on its part, the government, or anyone in privity with the government, could justly complain and by suit, brought within the time fixed by congress for that purpose, procure a cancellation of such patents. But this is not such a suit. Neither the government nor any one in privity with the government title, is here complaining. The suit is by strangers to that title, but by the express averments of the bill, the complainants' alleged rights were not initiated until years after the issuance of the patents which they expressly allege conveyed to the railroad company the legal title to the lands. That the complainants cannot be heard to complain of the alleged frauds upon the government is thoroughly settled by decisions so numerous as to make their citation unnecessary. They must be familiar to all lawyers at all acquainted with the law in respect to the public lands. The only real question, therefore, in the case is whether the lands in suit are excluded from the patents by reason of the alleged subsequent discovery by mineral therein by the complainants, under the exception clause inserted in the patents, already quoted, but which I here repeat:

"Yet excluding and excepting 'all mineral lands,' should any such be found in the tracts aforesaid. But this exclusion and exception, according to the terms of the statute, shall not be construed to include 'coal and iron lands.'"

Where did the officers of the government, charged with the duty of issuing patents for lands granted by congress, get authority to cast upon courts or juries the duty or power of ascertaining and determining the character of the public lands applied for under the grant, which congress devolved upon the land department of the government as a pre-requisite to the issuance of a patent therefor? The statutes of the United

States will be searched in vain for any such authority, unless it can be deduced from the joint resolution of congress of June 28, 1870 (16 Stats. 382), relating to the grant to the Southern Pacific Railroad Company made by its preceding act of July 27, 1866 (14 Stats. 292).

By the latter act Congress chartered the Atlantic and Pacific Railroad Company, empowered it to build a railroad commencing at a point at or near Springfield, Missouri, along a generally described route to the Colorado river, and, after crossing that river, by the most practicable and eligible route to the Pacific Ocean, granting to such company by the third section of the act:

"Every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the commissioner of the general land office."

The 18th section of the act made a grant to the Southern Pacific Railroad Company, and is as follows:

"And be it further enacted, That the Southern Pacific Railroad, a company incorporated under the laws of the state of California, is hereby authorized to connect with the said Atlantic and Pacific Railroad, formed under this act, at such point, near the boundary line of the state of California, as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare with

said road; and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific Railroad herein provided for."

By section 4 of the act it was provided that whenever the railroad company "shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the president of the United States shall appoint three commissioners to examine the same, who shall be paid a reasonable compensation for their services by the company, to be determined by the secretary of the interior; and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report under oath, to the president of the United States, and patents of lands, as aforesaid, shall be issued to said company, conforming to said company the right and title to said lands situated opposite to and coterminous with said completed section of said road. And from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the president of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid."

As recited in the foregoing act of congress, the Southern Pacific Railroad Company was a corporation of the state of California, and by its charter was authorized to build a railroad "from some point on the bay of San Francisco, in the

state of California, through the counties of Santa Clara, Monterey, San Luis Obispo, Tulare, Los Angeles and San Diego to the eastern line of said state of California, there to connect with a contemplated railroad from said eastern line of the state of California to the Mississippi river."

The act of 1866, as has been seen, authorized the Southern Pacific Railroad Company to connect with the Atlantic and Pacific Railroad "at such point, near the boundary line of the state of California, as they shall deem most suitable for a railroad line to San Francisco." That company undertook to lay out a different route from that designated in its articles of incorporation, and on the 3d day of January, 1867, filed with the commissioner of the general land office a map showing the line of route so adopted by the company, and on the 4th of the succeeding month the then secretary of the interior directed the commissioner of the general land office to cause to be withdrawn from sale or disposal the odd sections within the granted limits of twenty miles on each side of the road, as shown on the map so filed January 3, 1867, and also the odd sections outside of the twenty miles and within thirty miles on each side of the said route, from which indemnity for land otherwise disposed of by the government within the granted limits should be taken. July 14, 1868, the said order of withdrawal was revoked and the lands included therein were opened to sale. On the 20th of August following, the latter order was suspended, so far as it related to lands south of San Jose, California, and November 2 and 11, 1869, the then secretary of the interior revoked the suspension of August 20, 1868, and directed the restoration to sale, after sixty days' notice, of the lands included in the suspension order. On the 15th of the next month the orders of November 2 and 11, made the preceding month, were suspended.

(Opinions of Attorney General, Vol. 16, pp. 80-89.) July 25, 1868, the time for the construction of the road by the Southern Pacific Railroad Company was extended by congress (15 Stats. 187), and on June 28, 1870, congress passed the joint resolution in question, which is here set out in full:

"Be it resolved by the senate and house of representatives of the United States of America in congress assembled, that the Southern Pacific Railroad Company of California may construct its road and telegraph line, as near as may be, on the route indicated by the map filed by said company in the department of the interior on the third day of January, eighteen hundred and sixty-seven; and upon the construction of each section of said road, in the manner and within the time provided by law, and notice thereof being given by the company to the secretary of the interior, he shall direct an examination of each such section by commissioners to be appointed by the president, as provided in the act making a grant of land to said company, approved July twenty-seventh, eighteen hundred and sixty-six, and upon the report of the commissioners to the secretary of the interior that such section of said railroad and telegraph line has been constructed as required by law, it shall be the duty of the said secretary of the interior to cause patents to be issued to said company for the sections of land coterminous to each constructed section reported on as aforesaid, to the extent and amount granted to said company by the said act of July twenty-seventh, eighteen hundred and sixty-six, expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act."

In their brief counsel for the complainants ask the court to "account for, explain, construe, in-

terpret and apply" the foregoing saving clause. The reason for and purpose of it is quite fully set forth in the debate in the senate upon the resolution, where it was first introduced (congressional record, part V, 2nd session, 41 congress 1869-1870, pp. 3950, 3951, 3952, 3953).

While asking the court to account for and explain the clause, counsel at the same time assert that the court is not at liberty to refer to the debate in the senate upon the subject. It is quite true that the meaning of the clause is to be determined from the language used by congress, but counsel are mistaken in supposing and asserting it to be improper for the court to refer to the debate. In Binnis vs. United States, 194 U. S. 486,495, the Supreme Court said:

"While it is generally true that debates in congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body, United States vs. Freight Association, 166 U. S. 290, 318, yet it is also true that we have examined the reports of the committees of either body with a view of determinating the scope of statutes passed on the strength of such reports. Holy Trinity Church vs. United States, 143, U. S. 457, 464. When sections 461 and 462 were under consideration in the senate the chairman of the committee on territories, in response to inquiries from senators, made these replies:

" 'The committee on territories have thoroughly investigated the condition of affairs in Alaska and have prepared certain licenses which in their judgment will create a revenue sufficient to defray all the expenses of the government of the territory of Alaska. * * * They are licenses peculiar to the condition of affairs in the territory of Alaska on certain lines of goods, articles of commerce, etc., which, in the judgment of the committee, should bear a license, inasmuch as there is no tax-

ation whatever in Alaska. Not one dollar of taxes is raised on any kind of property there. It is therefore necessary to raise revenue of some kind, and in the judgment of the committee on territories, after consultation with prominent citizens of the territory of Alaska, including the governor and several other officers, this code or list of licenses was prepared by the committee. It was prepared largely upon their suggestions and upon the information of the committee derived from conversing with them.' Vol. 32, congressional record, part LLL, page 2235."

In Jennison vs. Kirk, 98 U. S. 453, 459, the same court, in construing an act of congress and in referring to and setting forth certain statements of one of the senators made in the senate, said:

"These statements of the author of the act in advocating its adoption cannot, of course, control its construction, where there is doubt as to its meaning; but they show the condition of mining property on the public lands of the United States, and the tenure by which it was held by miners in the absence of legislation on the subject, and thus serve to indicate the probable intention of congress in the passage of the act."

In the case of People vs. Stephens, 62 Cal. 209, 235, 236, the Supreme Court of California, in construing one of the provisions of the constitution of the state, referred to the purpose of the provision as explained in the debates in the constitutional convention by the member at whose instance it was inserted and became a part of the constitution. See, also, Wadsworth vs. Boysen, 148 Fed. 771, 778; Ho Ah Kow vs. Nunan, Fed. Case No. 6546.

Turning to the debate in the senate upon the saving clause added to the joint resolution of June 28, 1870, it is readily seen that its purpose was to protect those settlers who had located

upon public lands along the line of the proposed changed route of the Southern Pacific Railroad Company, as indicated by the map filed by that company in the general land office on the 3d of January, 1867. By the joint resolution congress sanctioned the change of route and made to the Southern Pacific Railroad Company a precisely similar grant of land on each side of that line that it had made to the same company by the 18th section of the act of July 27, 1866, on each side of the line of road therein authorized; but to protect not only those who had acquired or might acquire prior to the attaching of the grant a legal right to lands along the line of the changed route, but also all actual settlers thereon, congress provided in and by the joint resolution that the change of route thereby authorized and the grant of lands thereby made should not affect the rights of any actual settler, and further that the grant of lands thereby made to the Southern Pacific Railroad Company along the new route was and should be subject to the same conditions and restrictions as applied to the original grant made to that company in and by the act of July 27, 1866—the language of the joint resolution being, as has been seen: "Expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act."

Those conditions and restrictions are specifically stated in the Act of 1866 and are, in substance, that the grant should not apply to any mineral land nor to any land reserved, sold, granted or otherwise appropriated, nor to any land to which the United States did not have full title and which was not free from pre-emption or other claims or right at the time the line of the road should be designated by a plat thereof filed in the office of the commissioner of the general land office. Such are the express provisions of

the grant of July 27, 1866, expressly referred to in joint resolution for the conditions and restrictions of the grant of the lands thereby made along the line of road thereby authorized to be built. There is absolutely nothing in the saving clause of the joint resolution, in my opinion, either requiring or authorizing the patents thereby directed to be issued for the granted lands to contain those conditions or restrictions, or any of them. If such patents were thereby required or authorized to contain one of the conditions or restrictions, then manifestly they were required to contain all of them, for no distinction is made between them by congress and none can be found in the language of its acts in question. Clearly, therefore, if the contention of the complainants' counsel is correct, that by the joint resolution of June 28, 1870, congress required that the patents to be issued to the railroad company for lands within the grant made to it should contain an exception of all mineral lands, they were likewise required to contain a similar exception of all lands reserved, sold, granted or otherwise appropriated, and all land to which the United States did not have full title and which was not free from pre-emption or other claims or rights at the time the line of the grantee's road was designated by a plat thereof filed in the office of the commissioner of the general land office. There is no escape from this conclusion for I repeat that the statute makes no distinction between the conditions and restrictions of the grant, save only the rights of actual settlers therein expressly specified, and no distinction in the other conditions and restrictions of this grant has been or can be suggested by counsel for the simple reason that the statute contains none. The result is that, according to the contention of counsel for the complainants, we would have congress providing for the issuance of government patents for lands under

its grant which upon their face would leave open for all time, to be decided by courts or juries, as the case might be, not only the question as to the character of the land patented but also as to whether it had been reserved, sold, granted or otherwise appropriated, and as to whether the United States had full title, and whether it was free from pre-emption or other claims or rights at the time the railroad company designated the line of its road by filing a plat thereof in the office of the commissioner of the general land office. As a matter of course, congress never intended anything of the sort, and there is nothing in the acts in question nor in any other grant to any railroad company that has ever come under my observation, or in any decision of the Supreme Court, that gives any support to any such conclusion.

The patent was the last step in the proceedings provided for by congress and was designed, as the statute expressly declares, to convey the government title to the grantee. Of what avail would such an instrument, intended for the peace and security of the holder, be if the antecedent facts upon which it is required to be based are open to subsequent inquiry and contestation by strangers to the title? As well might it be contended that questions of fact in respect to the marking of the boundaries of a patented mining claim or the previous discovery of mineral therein, or any other fact made essential by the statute to the issuance of a mining patent, are open to inquiry by the courts subsequent to its issue. In respect to such a contention this court said in the case of Doe v. Waterloo Mining Co., 54 Fed. 935, 940:

"If the rights conferred by the patent can be defeated by showing a want of parallelism of the end lines in the original location, it is difficult to understand why the patent may not likewise be defeated by showing that the original location was void because its boundaries were not properly

marked upon the ground, or because no vein, lode, or ledge was discovered within them, or because the statutory requirement in respect to the posting of the notice of location was not complied with, or because of an omission on the part of the locator to comply with any other provision of the statute regarding the location of such lode claims? All such matters I understand to be absolutely concluded by the patent so long as it stands unrevoked. If questions relating to the boundaries of the location, the marking of them, the posting of the required notice, etc., are open to contestation after the issuance of a patent for the claim as before, the issuance of such an instrument would be a vain act, and would wholly fail to secure to the patentee the rights and privileges designed by the law authorizing its issue. The very purpose of the patent is to do away with the necessity of going back to the facts upon which it is based."

Great reliance is placed by counsel for the complainants on this clause from the opinion of the Supreme Court in the case of Barden vs. Northern Pacific Railroad Co., 154 U. S. 288:

"The delay of the government in issuing a patent to the plaintiff, of which great complaint is made, does not affect the power of the company to assert, in the meantime, by possessory action (as held in Deseret Salt Company vs. Tarpey, 142 U. S. 241), its right to lands which are in fact non-mineral. But such delay, as well observed, cannot have the effect of entitling it to recover, as is contended in this case, lands which it admits to be mineral. The government cannot be reasonably expected to issue its patent, and it is not authorized to do so, without excepting mineral lands, until it has had an opportunity to have the country, or that part of it for which a patent is sought, sufficiently explored to justify its declaration in the patent, which would be taken as its de-

termination, that no mineral lands exist therein."

The observation that "the government cannot be reasonably expected to issue its patent, and it is not authorized to do so, without excepting mineral lands, until it has had an opportunity to have the country, or that part of it for which a patent is sought, sufficiently explored to justify its declaration in the patent" is very far from saying, much less deciding, that a patent issued for lands in pursuance of such a grant must or may except from the lands described in the granting clause thereof all mineral lands. The court could not have so decided in that case, for there was no such question before the court, and could not have been, as no patent had been issued in the case there under consideration. It was an action by the Northern Pacific Railroad Company to recover certain lands, confessedly mineral in character, as a part of its land grant, which grant, like the one here in question, excluded all mineral land therefrom on the ground that when that grant became attached to the various sections within it by the definite location of the company's line of road, the land in suit was not known to be mineral land; and the question in the case, as will be readily seen from the prevailing as well as the dissenting opinions, was whether that fact entitled the railroad company to the land sued for as part of its grant, or whether such land was excluded from the grant by the discovery of its mineral character at any time prior to the issuance of the government patent therefor. The majority of the court held that the character of the land was open to inquiry at any time prior to the issuance of the patent, and that the discovery of its mineral character at any time before it was patented necessarily excluded it from the grant, because the grant was of non-mineral land only. But the court in the prevailing opinion distinctly pointed out that the duty of ascertaining and determining the

character of the land rested upon the officers of the land department, and there is, I think, nothing in it even tending to show that that or any other matter of fact could be left by them to the ascertainment and determination of a court or jury subsequent to the issuance of the government patent.

The court said: "The law places under the supervision of the interior department and its subordinate officers, acting under its direction, the control of all matters affecting the disposition of public lands of the United States, and the adjustment of private claims to them under the legislation of congress. It can hear contestants and decide upon the respective merits of their claims. It can investigate and settle the contentions of all persons with respect to such claims. It can hear evidence upon and determine the character of lands to which different parties assert a right; and when the controversy before it is fully considered and ended, it can issue to the rightful claimant the patent provided by law, specifying that the lands are of the character for which a patent is authorized. It can thus determine whether the lands called for are swamp lands, timber lands, agricultural lands, or mineral lands, and so designate them in the patent which it issues. The act of congress making the grant to the plaintiff provides for the issue of a patent to the grantee for the land claimed, and as the grant excludes mineral lands in the direction for such patent to issue, the land office can examine into the character of the lands, and designate it in its conveyance.

"It is the established doctrine, expressed in numerous decisions of this court, that wherever congress has provided for the disposition of any portion of the public lands, of a particular character, and authorizes the officers of the land department to issue a patent for such land upon

ascertainment of certain facts, that department has jurisdiction to inquire into and determine as to the existence of such facts, and in the absence of fraud, imposition, or mistake, its determination is conclusive against collateral attack.

"In Smelting Co. vs. Kemp, 104 U. S. 636, 640, 641, this court thus spoke of the land department in the transfer of public lands: 'The patent of the United States is the conveyance by which the nation passes its title to portions of the public domain. For the transfer of that title the law has made numerous provisions, designating the persons who may acquire it and the terms of its acquisition. That the provisions may be properly carried out the land department, as part of the administrative and executive branch of the government, has been created to supervise all the various proceedings taken to obtain title from their commencement to their close. In the course of their duty the officers of that department are constantly called upon to hear testimony as to matters presented for their consideration and to pass upon its competency, credibility, and weight. In that respect they exercise a judicial function, and therefore it has been held in various instances by this court that their judgment as to matters of fact properly determinable by them is conclusive, when brought to notice in a collateral proceeding. Their judgment in such cases is like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable except by a direct proceeding for its correction or annulment. The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned, and sealed, not merely operates to pass the title, but in the nature of an official declaration by that branch of the government to which the

alienation of the public lands, under the law, is entrusted, that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action of law.'

"In Steel vs. Smelting Co., 106 U. S. 447, 450, the language of the court was that: 'The land department, as we have repeatedly said, was established to supervise various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualification of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation.'

"In Heath vs. Wallace, 138 U. S. 573, 585, it was held that 'the question whether or not lands returned as "subject to periodical overflow" are "swamp and overflowed lands" is a question of fact properly determinable by the land department.' And Mr. Justice Lamar added: 'It is settled by an unbroken line of decisions of this court in land jurisprudence that the decisions of that department upon matters of fact within its jurisdiction are, in the absence of fraud or imposition, conclusive and binding on the courts of the country.' If the land department must decide what lands shall not be patented because reserved, sold, granted, or otherwise appropriated, or because not free from pre-emption or other claims or rights at the time the line of the road is definitely fixed, it must also decide whether lands are excepted because they are mineral lands. It has always exercised this jurisdiction in patenting

lands which were alleged to be mineral, or in refusing to patent them because the evidence was insufficient to show that they contained minerals in such quantities as to justify the issue of the patent. If, as suggested by counsel, when the secretary of the interior has under consideration a list of lands to be patented to the Northern Pacific Railroad Company, it is shown that part of said lands contain minerals of gold and silver, discovered since the company's location of its road opposite thereto, he would not perform his duty, stated in Knight vs. Land Association, 142 U. S. 161, 178, as the 'supervising agent of the government to do justice to all claims and preserve the rights of the people of the United States,' by certifying the list until corrected in accordance with the discoveries made known to the department. He would not otherwise discharge the trust reposed in him in the administration of the law respecting the public domain.

"There are undoubtedly many cases arising before the land department in the disposition of the public lands where it will be a matter of much difficulty on the part of its officers to ascertain with accuracy whether the lands to be disposed of are to be deemed mineral lands or agricultural lands, and in such cases the rule adopted that they will be considered mineral or agricultural as they are more valuable in the one class or the other, may be sound. The officers will be governed by the knowledge of the lands obtained at the time as to their real character. The determination of the fact by those officers that they are one or the other will be considered as conclusive.

"In the case of the Central Pacific Railroad Company vs. Valentine, 11 Land Dec. 238, 246, the late secretary of the interior, Mr. Noble, speaks of the practice of the land department in issuing patents to railroad lands. His language is: 'The very fact, if it be true, that the office

of the patent is to define and identify the land granted, and to evidence the title which vested by the act, necessarily implies that there exists jurisdiction in some tribunal to ascertain and determine what lands were subject to the grant and capable of passing thereunder. Now, this jurisdiction, is in the land department, and it continues, as we have seen, until the lands have been either patented or certified to or for the use of the railroad company. By reason of this jurisdiction it has been the practice of that department for many past years to refuse to issue patents to railroad companies for lands found to be mineral in character at any time before the date of patent. Moreover, I am informed by the officers in charge of the mineral division of the land department that ever since the year 1867 (the date when that division was organized) it has been the uniform practice to allow and maintain mineral locations within the geographical limits of railroad grants, based upon discoveries made at any time before patent or certification where patent is not required. This practice having been uniformly followed and generally accepted for so long a time there should be, in my judgment, the clearest evidence of error as well as the strongest reasons of policy and justice controlling before a departure from it should be sanctioned. It has, in effect, become a rule of property.'

"It is true that the patent has been issued in many instances without the investigation and consideration which the public interest requires; but if that has been done without fraud, though unadvisedly by officers of the government charged with the duty of supervising and attending to the preparation and issue of such patents, the consequence must be borne by the government until by further legislation a stricter regard to their duties in that respect can be enforced upon them.

The fact remains that under the law the duty of determining the character of the lands granted by congress, and stating it in instruments transferring the title of the government to the grantees, reposes in officers of the land department. Until such patent is issued, defining the character of the land granted and showing that it is non-mineral, it will not comply with the act of congress in which the grant before us was made to plaintiff. The grant, even when all the acts required of the grantees are performed, only passes a title to non-mineral lands; but a patent issued in proper form, upon a judgment rendered after a due examination of the subject by officers of the land department, charged with its preparation and issue, that the lands were non-mineral, would, unless set aside and annulled by direct proceedings, estop the government from contending to the contrary, and as we have already said in the absence of fraud in the officers of the department, would be conclusive in subsequent proceedings respecting the title."

I do not find in this language of the prevailing opinion in the Barden case any support for the contention of the complainants' counsel that the officers of the land department were required or authorized to insert in the patents here in question, or in any other similar patent, after describing the lands falling within the railroad grant, a clause "excluding and exempting all mineral lands, should any such be found in the tracts aforesaid." And that the Supreme Court itself takes the same view of the decision in the Barden case is, I think, shown by its reference thereto in the case of Shaw vs. Kellogg, 170 U. S. 313, where, at page 339, it says:

"Defendant relies largely on the decision of this court in Barden vs. Northern Pacific Railroad, 154 U. S. 288, in which it was held that

lands identified by the filing of the map of definite location as within the scope of the grant made by congress to that company, although at the time of the filing of such map not known to contain any mineral, did not pass under the grant if before the issue of the patent mineral was discovered. But that case, properly considered, sustains rather the contentions of the plaintiff. It is true there was a division of opinion, but that division was only as to the time at which and the means by which the non-mineral character of the land was settled. The minority were of the opinion that the question was settled at the time of the filing of the map of definite location. The majority, relying on the language in the original act of 1864 making the grant, and also on the joint resolution of January 30, 1865, which expressly declared that such grant should not be 'construed as to embrace mineral lands, which in all cases shall be and are reserved exclusively to the United States,' held that the question of mineral or non-mineral was open to consideration up to the time of issuing a patent. But there was no division of opinion as to the question that when the legal title did pass—and it passed unquestionably by the patent—it passed free from the contingency of future discovery of minerals."

I am also of the opinion that the case last referred to—Shaw vs. Kellogg—is direct authority for the proposition that the officers of the land department had no authority to insert in the patents under consideration the clause excepting from the lands described in its granting clause "all mineral lands, should any such be found in the tracts aforesaid." The grant involved in Shaw vs. Kellogg was made by section 6 of an act of congress passed June 21, 1860 (12 Stats. 71), in settlement of a claim under a Mexican grant to land in the vicinity of Los Vegas by which the claimants were given an equal amount of non-

mineral and vacant land to be by them elsewhere selected in the territory of New Mexico, to be located in a certain form and within a certain time. It was by the act made the duty of the surveyor general of New Mexico to make survey and location of the land so selected. The grantees made their selection and applied for the land. Certain correspondence occurred between the land department and the surveyor general in respect to the form of the application and in respect to the evidence relating to the character of the land, that is to say, whether or not it was mineral land, which resulted in the land department instructing the surveyor general to approve the selection and make a survey thereof. The land department subsequently approved the survey, field notes and plat of the surveyor general, but in doing so added the words "subject to the conditions and provisions of section 6 of the act of congress approved June 21, 1860," which, as has been seen, excluded mineral land from the grant. The act of congress did not provide for the issuance of a patent, but the land department noted on its maps that this tract had been segregated from the public domain and had become private property and so reported to congress, which never questioned the validity of such action. The grantees were also notified and took possession of the land. Many years afterwards a portion of it was claimed as mineral land by a party whose contentions were thus stated by the Supreme Court in its opinion:

"These contentions are that congress granted only non-mineral lands; that this particular tract is mineral land, and therefore by the terms of the act is not within the grant; that no patent has ever been issued, and therefore the legal title has never passed from the government; that the land department never adjudicated that this was non-mineral land, but on the contrary simply approved

the location, subject to the conditions and provisions of the act of congress, thereby leaving the question of title to rest in perpetual abeyance upon possible future discoveries of mineral within the tract."

In considering the limitation undertaken to be imposed by the land department upon its approval of the selection of the land by the grantees and the surveyor general's survey, field-notes and plat thereof, the Supreme Court said:

"What is the significance of, and what effect can be given to the clause inserted in the certificate of approval of the plat that it was subject to the conditions and provisions of the act of congress? We are of the opinion that the insertion of any such stipulation and limitation was beyond the power of the land department. Its duty was to decide and not to decline to decide; to execute and not to refuse to execute the will of congress. It could not deal with the land as an owner and prescribe the conditions upon which title might be transferred. It was agent and not principal. Congress had made a grant, authorized a selection within three years, and directed the surveyor general to make survey and location, and within the general powers of the land department it was its duty to see that such grant was carried into effect and that a full title to the proper land was made. Undoubtedly it could refuse to approve a location on the ground that the land was mineral. It was its duty to decide the question—a duty which it could not avoid or evade. It could not say to the locator that it approved the location provided no mineral should ever thereafter be discovered, and disapproved it if mineral were discovered; in other words, that the locator must take the chances of future discovery of minerals. It was a question for its action and its action at the time. The general statutes of congress in respect to homestead, pre-emption

and townsite locations provide that they shall be made upon lands that are non-mineral, and in approving any such entry and issuing a patent therefor could it be tolerated for a moment that the land department might limit the grant and qualify the title by a stipulation that if thereafter mineral should be discovered the title should fail? It cannot in that way avoid the responsibility of deciding and giving to the party seeking to make the entry a full title to the land or else denying it altogether. As said in Deffeback vs. Hawke, *supra*, 406:

" 'The position that the patent to the plaintiff should have contained a reservation excluding from its operation all building and improvements not belonging to him, and all rights necessary or proper to the possession and enjoyment of the same, has no support in any legislation of congress. The land officers, who are merely agents of the law, had no authority to insert in the patent any other terms than those of conveyance, with recitals showing a compliance with the law and the conditions which it prescribed.' "

It results from what has been said that the demurrers must be, and are, sustained and the bills dismissed at the complainant's cost.

Ross,
Circuit Judge.

(Opinion.)

In the United States Circuit Court in and for the Southern District of California, Northern Division.

Edmund Burke, complainant, vs. Southern Pacific Railroad Company, *et al.*, defendants.

The views expressed in the opinion delivered in the case of Roberts *et al.* vs. Southern Pacific Railroad Company, just decided, applied to this case, makes necessary the sustaining of the demurrers to the bill and cross-bill and their dis-

missal at the cost of the respective complainants. An order to that effect will be entered.

(Endorsed): No. 192. In the United States Circuit Court, Ninth Judicial Circuit, Southern District of California, Northern Division. Edmund Burke vs. Southern Pacific Railroad Company *et al.* Opinion. Filed Mar. 13, 1911. Wm. M. Van Dyke, clerk; by Chas. N. Williams, deputy clerk.

EXHIBIT "D."

DEED No. 11692.

This deed, made February 15th, 1900, between the Southern Pacific Railroad Company, a corporation, D. O. Mills and Homer S. King, trustees under the trust deed hereinafter set forth, the parties of the first part, and John A. Bunting, the party of the second part, witnesseth: That

Whereas, on April 1st, 1875, the said Southern Pacific Railroad Company, by trust deed bearing that date, conveyed to D. O. Mills and Lloyd Tevis, their successors and assigns, all lands granted by the United States to aid in the construction of the said company's railroads in trust to secure payment of certain bonds particularly set forth in the said trust deed; of which the lands hereinafter described are a part; and

Whereas, the said trust deed provided that the said company may sell the lands in it conveyed as opportunity occurred, upon terms agreed upon by the said company and trustees; and that when a tract or parcel of said lands shall have been sold and the purchase price fully paid, it shall be conveyed in fee simple by the said company and trustees, to the purchaser thereof; and that such conveyance shall release the land so conveyed from all lien or incumbrance of the said trust deed, absolutely and forever; and

Whereas, the said trust deed further provided

that in case a vacancy should occur in the number of said trustees, such vacancy should be filled by the nomination of the remaining trustees, subject to the approval of the board of directors of the said company; and that the person so nominated and approved should immediately upon his acceptance of such appointment, become a trustee under such trust deed, vested with the same estates, powers, rights and interests and charged with the same duties and responsibilities, as if he had been one of the original trustees named in and who executed the said trust deed; and

Whereas, on March 24th, 1883, Lloyd Tevis, one of the trustees aforesaid, resigned his trust under the said trust deed; and on April 3, 1883, the said D. O. Mills, as remaining trustee, nominated Gerrit L. Lansing to fill the vacancy created by the resignation of the said Lloyd Tevis; and on April 17th, 1883, the board of directors of the said company approved the nomination of the said Gerrit L. Lansing and on April 18th, 1883, the said Gerrit L. Lansing duly accepted the said appointment; and

Whereas, on February 4th, 1896, the said Gerrit L. Lansing died; and on March 14th, 1896, the said D. O. Mills, as remaining trustee, nominated Homer S. King to fill the vacancy created by the death of the said Gerrit L. Lansing; and on March 18th, 1896, the board of directors of the said company approved the nomination of the said Homer S. King; and on March 21st, 1896, the said Homer S. King duly accepted the said appointment; and

Whereas, the said trust deed further provided that the trustees under it shall have the power and authority to act by attorney, to be appointed by them, in making the conveyances in said trust deed provided for; such appointment to be made by letter of attorney, duly acknowledged, and to

be recorded in each county within which any of the lands of the said trust deed are situated; and that all deeds made in the names of said trustees, by their attorney appointed as aforesaid, shall have the same force and effect as if made by the said trustees in person; and

Whereas, on March 28th, 1896, the said D. O. Mills and Homer S. King, trustees as aforesaid, by letter of attorney duly acknowledged and recorded as in the said trust deed provided, appointed Jerome Madden, their true and lawful attorney, in their names, place and stead, to make, execute and deliver all conveyances required of them under and pursuant to the terms of the said trust deed; and

Whereas, the said company contracted to sell the hereinafter described lands on terms agreed upon by it and the said trustees to John A. Bunting for the sum of sixteen hundred and thirty-four 52-100 ($1634.52) dollars, which sum has been fully paid to the said D. O. Mills and Homer S. King, trustee, as aforesaid.

Now, therefore, in consideration of the premises, and the said sum of sixteen hundred and thity-four 52-100 ($1634.52) dollars, the receipt whereof is hereby acknowledged, the parties of the first part do grant and convey to the said party of the second part, and to his heirs and assigns, the following described tract of land situate, lying and being in the county of Kern, and state of California, to-wit: All of fractional section No. thirty-one (31), in township twenty-eight (28) south, of range twenty-eight (28) east, Mount Diablo base and meridian, containing six hundred and fifty-three 81-100 (653 81-100) acres, according to the United States surveys, together with all the privileges and appurtenances thereunto appertaining and belonging, excepting and reserving all liability on the part of the Southern Pacific Railroad Company, for taxes and assess-

ments thereon since August 1st, 1899, the said purchaser having heretofore agreed with said company to *pay the same, and also reserving all claim of the United States to said tract as mineral lands.*

To have and to hold the aforesaid premises, to the said party of the second part, his heirs and assigns, to his and their use and behoof forever.

In testimony whereof, the said Southern Pacific Railroad Company has caused its name to be signed to these presents by its president *pro tem* and secretary, and its corporate seal to be hereunto affixed; and the said D. O. Mills and Homer S. King, trustees, by their said attorney, Jerome Madden, have hereunto subscribed their names and affixed their seals the date herein first written.

SOUTHERN PACIFIC RAILROAD COMPANY,
(Seal) By H. E. HUNTINGTON,
Its President (Pro Tem.)
By J. L. WILLCUT,
Its Secretary.
D. O. MILLS, (Seal)
HOMER S. KING, (Seal)
Trustees.
By JEROME MADDEN,
Their Joint Attorney-in-Fact.

State of California, City and County of San Francisco—ss.

On this 16th day of February, in the year one thousand nine hundred (1900), before me, E. B. Ryan, a notary public in and for said city and county of San Francisco, state of California, personally appeared H. E. Huntington, known to me to be president *(pro tem.)*, and J. L. Willcut, known to me to be the secretary of the corporation that executed the within instrument; and each of them acknowledged to me that such corporation executed the same; also, on this the day aforesaid, before me, the notary public aforesaid, personally appeared Jerome Madden, known to

me to be the person whose name is subscribed to the within instrument, as the attorney-in-fact of D. O. Mills and Homer S. King, and acknowledged to me that he subscribed the names of the said D. O. Mills and Homer S. King thereto as principals, and his own as attorney-in-fact.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in the city and county of San Francisco, state of California, on the day and year above written.

(Seal) E. B. RYAN,

Notary Public in and for the City and County of San Francisco and State of California.

I certify the foregoing to be a true copy of the original filed for record at the request of the Kern County Abstract Company, February 17th, 1900, at 8:50 a. m.

CHAS. A. LEE, *Recorder.*

By C. S. MERONEY, *Deputy.*

State of California, County of Kern—ss.

I, Chas. A. Lee, county recorder of said county, do hereby certify that the annexed is a whole, true and correct copy of an original, as will appear by reference to book 98 of deeds, page 10, now in my office, and that said copy has been compared with the original, and is a correct transcript therefrom.

Witness my hand and official seal this 25th day of November, A. D. 1910.

(Seal) CHAS. A. LEE,

Recorder in and for the County of Kern, California.

Exhibit "E."

Memorandum in Relation to the Southern Pacific Land Locations at Coalinga Under the Jerome Madden Application for Patent.

1. Madden was appointed land agent of the railroad company by a resolution of its board of directors on the 10th day of May, 1876.

2. Prior to the 14th day of May, 1892, Madden as such land agent filed in the Visalia land office an application for the granted lands running to the railroad company for a construction of the 9th and 17th sections of said road commencing at a point N. E. quarter S. 2, T. 19 S., R. 20 E., M. D. B. & M., and ending at Alcalde.

3. On the 9th day of May, 1892, Madden made the following affidavit:

"State of California, City and County of San Francisco.

I, Jerome Madden, being duly sworn, deposes and say: That I am the land agent of the Southern Pacific Railroad Company, that the foregoing list of lands which I hereby select is a correct list of a portion of the public lands claimed by the Southern Pacific Railroad Company in inuring to it, to aid in the construction of the railroad of said company from a point in N. E. ¼ Sec. 2, T. 19 S., R. 20 E., M. D. B. & M. to Alcalde, for which a grant of land was made by the acts of congress approved July 27th, 1866, July 25th, 1868, and June 28th, 1870, as aforesaid, and that the said lands are vacant, unappropriated, and are not interdicted mineral nor reserved lands, and are of the character comtemplated by the grant, being within the limits of twenty (20) miles on each side of the land of route for a continuous distance of forty 559-1000 (40 559-1000) miles,

being for the ninth (9th) and seventeenth (17th) sections of said road, starting from a point in N. E. ¼ Sec. 2, T. 19 S., R. 20 east, M. D. B. & M., and ending at a point in N. E. ¼ Sec. 23, T. 21 S., R. 14 E., M. D. B. & M.

(Seal) JEROME MADDEN.

Sworn to and subscribed before me this ninth (9th) day of May, 1892. Witness my hand and notarial seal.

E. B. RYAN,

Notary Public in and for the City and County of San Francisco, in the State of California."

4. Thereupon the register and receiver made the following certificate:

"United States Land Office,

Visalia, Cal., May 14, 1892.

"We hereby certify that we have carefully and critically examined the foregoing list of lands claimed by the Southern Pacific Railroad Company, by acts of congress, aproved July 29th, 1866, July 25th, 1868, and June 28th, 1870, above mentioned, and selected by Jerome Madden, the duly authorized agent, and we have tested the accuracy of said list by the plats and records of this office, and that we find the same to be correct, and we further certify that the filing of said list is allowed and approved, and that the whole of said lands are surveyed public lands of the United States and within the limit of twenty (20) miles on each side; and that the same are not, nor is any part thereof, returned and denominated as mineral land or lands, nor claimed as swamp lands; nor is there any homestead, pre-emption, state, or other valid claims to any portion of said lands on file or record in this office.

We further certify that the foregoing list shows an assessment of the fees payable to us, allowed by the act of congress, approved July 1st, 1864, and contemplated by the circular of instructions dated January 24th, 1867, addressed by the

commissioner of the general land office to registers and receivers of the United States land office, and that the said company have paid the undersigned, the receiver, the full sum of forty-two hundred and fifty-eight ($4258.00) dollars in full payment and discharge of said fees.

M. J. WRIGHT, *Register.*
R. L. FREEMAN, *Receiver.*"

5. That on May 16th, 1894, the department of the interior made list No. 19 of Southern Pacific lands, main line, granted limits, Los Angeles, Independence, San Francisco and Visalia districts, California, which is a duplicate of list No. 34 filed by Madden and reading as follows:

"Department of the Interior,
General Land Office,
May 16th, 1894.

Whereas, by the act of congress approved July 27th, 1866, and joint resolution of June 28th. 1870, to aid in the construction of a railroad and telegraph line from the states of Missouri and Arkansas to the Pacific coast and to secure to the government the use of the same for postal, military or other purposes, authority is given to the Southern Pacific Railroad Company of California, a corporation existing under the laws of the state, to construct a railroad and telegraph line under certain conditions and stipulations expressed in said act, from the city of San Francisco to a point of connection with the Atlantic and Pacific Railroad, near the boundary line of said state, and provision is made for granting to the said company every alternate section of public land designated by odd numbers to the amount of twenty alternate sections per mile, on each side of said railroad, on the line thereof, and within the limits of twenty miles on each side of said road "not sold, reserved, or otherwise disposed of by the United States, and to which pre-emption

or homestead claim may not have attached at the time the line of said road was definitely fixed.

And whereas, official statements from the secretary of the interior have been filed in the general land office, showing that the commissioner appointed by the president, under the provisions of the fourth section of said act of July 27th, 1866, and have reported to him that the line of said railroad and telegraph, from San Jose to Tres Pinos, and from Alcalde to Mojave, together comprising two hundred and fifty-two miles and four hundred and seventy-nine thousands of the mile, has been constructed and fully completed and equipped in the manner prescribed by said act of July 27th, 1866, and accepted by the president.

And whereas, the following tracts have been duly listed under the act aforesaid, by the duly authorized land agent of the said Southern Pacific Railroad Company, as shown by his original lists of selections approved by the local officers and on file in this office.

And whereas, the said tracts of land lie coterminous to the constructed line of said road and are particularly described as follows, to-wit:" (Here follows description.)

6. That on the 16th day of May the following certificates were made.

"General Land Office,
Railroad Division,
May 16, 1894.

We hereby certify that the foregoing list has been carefully examined in connection with the records and plats of this office and the tracts therein described are found to be vacant and unappropriated and within the primary limits of the grant of July 27th, 1866, to the Southern Pacific Railroad Company (main line) and subject to ap-

proval and patent to said railroad company under said act.

M. B. HARVEY,
M. NIVEN,
Examiners.

Approved:
Chief of Division."

"General Land Office,
Mineral Division,
June 23, 1894.

This certifies that the tracts described in the foregoing clear list No. 19 have been examined in connection with the records of this office and are not to be in conflict with mining claims and were not returned as mineral by the United States surveyor-general. There are no mining claims of record for lands in the townships containing selections or within six miles of such selections.

GEO. F. POLLOCK,
C. A. HOLLINGSWORTH,
Examiners.

Approved:
J. WRIGHT,
Chief of Division."

6. That on June 23rd the following certificate was made:

"General Land Office,
Division of Swamp Lands,
Washington, D. C., June 23, 1894.

This certifies that the foregoing list No. 19, Southern Pacific railroad, aggregating 440,900.85 acres, has been carefully examined in connection with the swamp land records of this office,

and that the same has been found free from conflict.

G. T. PIERCE,
Examiner.

Approved:
EDMOND MALLET,
Chief of Division."

7. Thereafter and on June 27th, 1894, the commission of the general land office made the following oratory in connection with the application:

Now, therefore, as it has been found on a careful examination of the foregoing list in connection with the authenticated map on file in the general land office, of the survey of the Southern Pacific railroad route, that the lands fall within the twenty miles lateral limits of said route, and that *the said lands so far as the records of the general land office show are free from conflict*, it is hereby recommended that the tracts described covering four hundred and forty thousand nine hundred acres and eight-five hundredths of an acre be approved and carried into patent as the lands falling within the grant by the act aforesaid to the said *Southern Pacific Railroad Company of California, excluding, however, from the approval and from the transfer in the patent that may issue "all mineral lands," should any such be found in the tracts aforesaid*, but this exclusion, according to the terms of the statute, "shall not be construed to include iron and coal."

G. W. LAMOREAUX,
Commissioner.

To the Honorable Secretary of the Interior."

8. The secretary of the interior approved the order of the commissioner in the following order:

"Department of the Interior,
Washington, D. C., June 27th, 1894.

Approved) Covering four hundred and forty

thousand nine hundred acres and eighty-five hundredths of an acre.

HOKE SMITH,
Secretary."

EXHIBIT E.

CONGRESSIONAL JOINT RESOLUTION OF JUNE 28, 1870.

"Be it resolved by the senate and house of representatives of the United States of America in congress assembled, that the Southern Pacific Railroad Company of California may construct its road and telegraph line, as near as maybe, on the route indicated by the map filed by said company in the department of the interior on the third day of January, eighteen hundred and sixty seven; and upon construction of each section of said road, in the manner and within the time provided by law, and notice thereof being given by the company to the secretary of the interior, he shall direct an examination of each such section by commissioners to be appointed by the president as provided in the act, making a grant to said company, approved July twenty seventh, eighteen hundred and sixty six, and upon the report of the commissioners to the secretary of the interior that such section of said railroad and telegraph line has been constructed as required by law, it shall be the duty of the said secretary of the interior to cause patents to be issued to said company for the sections of land coterminous to each constructed section reported on as aforesaid, to the extent and amount granted to said company by the said act of July 27th, 1866, *expressly saving and reserving* all the rights of actual settlers, *together with the* other conditions and restrictions provided for *in the 3d section of said act.*"